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ACCOUNT STATED.

1. *Account stated—Opened how—Bill must allege what.*—A settlement can be opened only on the ground of fraud, error or mistake. And the proceeding for that purpose must specifically set forth such ground.—Kronenberger v. Binz, 121.

2. *Settlement—Time of payment extended—Notes given, etc.*—The amount ascertained by a settlement becomes due from the date thereof; and where by the terms of the settlement the debtor agrees to give his note payable at a day named for the amount found to be due, but fails to give the same, the debt accrues immediately.—*Id.*

ACKNOWLEDGMENT, see Husband and Wife, 6, 7.

ADJOINING PROPRIETORS, see Land and Land Titles, 13.

ADMINISTRATION.

1. *Administrator must determine for himself whether fund belongs to estate of deceased—Parol evidence, when proper, etc.*—An agent credited to the account of the husband, the proceeds derived from the sale of certain lands belonging to the wife and turned the sum over to the administrator of the husband, *Held*, that the administrator properly refused to be governed by the books of the agent, and was right in not charging himself with that amount. He was authorized to determine for himself to what fund it belonged. And the fact might be shown by parol evidence.—Pattison, Adm'r, v. Coons, 169.

2. *Probate Court—Administrator—Embezzlement, trial for—Judgment will authorize appeal.*—In a proceeding before the Probate Court against an administrator, charging him with concealing and embezzling the assets of the estate. (See Wagn. Stat., p. 85, §§ 7, 8, 10,) judgment on the merits would be a final one, as contemplated by the statute, so as to authorize an appeal to the Circuit Court.—Ruff v. Doyle, 301.

3. *Probate Court—Administration—Assignment of claim—Error in, corrected nunc pro tunc, when—Injunction—Equity, etc.*—A clerk of probate being misled by an erroneous memorandum of the judge, assigned the claim of A, which properly belonged to the 6th class in an administrator's settlement, to the 5th class, thereby causing said claim to be paid, and sacrificing others of the 6th class.

A creditor of the 6th class at a term subsequent to the erroneous assignment brought suit against A and the administrator, to enjoin A from proceeding to enforce his claim and to compel the administrator to assign said claim to the proper class:

ADMINISTRATION, continued.

Held: 1st, that the remedy of plaintiff was by a motion in the Probate Court to correct the error *nunc pro tunc* and not by injunction; 2nd. that although plaintiff was ignorant and A. was aware of the mistake at the term wherein it occurred, and during which appeal would lie to remedy it, yet there being no relation of trust between A. and the plaintiff requiring a disclosure of the facts, and no trick or artifice to produce or conceal the mistake being shown, plaintiff had, as against A., no equity on this ground.—Jillett, et al. v. U. Nat. Bank, et al., 304.

4. *Administration—Practice, civil—Parties—Action on administrator's bond—Distributees may sue jointly, before order of distribution.*—Before an order of distribution is made, those entitled to distribution have a common interest in the fund, and in an action against the sureties on the administrator's bond they may properly be joined as plaintiffs to prevent a multiplicity of suits.—Kelley v. Thornton, et al., 325.

5. *Administrator's bond—Sureties—Distributees may maintain action before final settlement.*—Where the administrator has failed to distribute funds in his hands according to law and has been removed, where there are no debts due by the estate persons entitled to distribution may bring suit on the administrator's bond without the appointment of an administrator *de bonis non* and before a final settlement.—Id.

6. *Wills—Extra-territorial operations of—Responsibility of executor.*—So far as realty is concerned, a will has no extra-territorial force, and the executor cannot sue for, or in anywise intermeddle with, property of his testator, real or personal, in another State, unless the will be there proven, or the laws of such States, dispensing with the probate anew, confer the requisite jurisdiction; and hence, where no such provisions prevail, he cannot be held liable on his bond as executor, for his acts done in another State. Whether he might not be chargeable as trustee for misapplication of funds received in another State, not passed on by the court.—Cabanne, *et al.* v. Skinker, Ex'r of Forsyth, *et al.*, 357.

7. *Administration—Real estate, sales of—Deeds, description in—Sheriff's sales.*—A sale of real estate by an administrator is *in invitum* as to the heirs, who are the real owners. He exercises a statutory power under the orders of the Probate Court, and the principles which apply to sheriffs' sales as to the description of the property to be sold, apply to administrators' sales.—Jones, et al. v. Carter, 403.

8. *Administrator—Real estate, sales of—Conveyance—Indefiniteness of description of land.*—In a deed to real estate made by an administrator, he described the land as 320 acres of land, "being parts of lots No. 6 and 12." In reality, lot 6 contained 173 acres and lot 12, 374 acres. *Held*, that the deed was void for uncertainty in the description.—Id.

9. *Wills—Contests touching—Administrator—Functions suspended—Appointment of administrator pendente lite—Construction of statute.*—Where proceedings are commenced in the Circuit Court under the statute (Wagn. Stat., 1368, § 29,) to contest the validity of a will, the Probate Court is authorized by virtue of § 13, of the Administration Act, (Wagn Stat., p. 72,) to suspend the functions of the executor or administrator, and to appoint a temporary administrator *pendente lite*. The latter section was enacted mainly, if not solely, in view of proceedings authorized by the statute touching wills.

This authority to suspend and supersede during the contest applies not merely to the case of an executor named in the will, but is broad enough to reach that of an administrator with the will annexed, who derives his power solely from appointment by the Probate Court.—Lamb, Adm'r v. Helm, Adm'x, 420.

10. *Executors—Powers derived chiefly from appointment.*—The power of an executor under our law to act as such is derived, not so much from the will of the testator as, from the appointment of the court and a compliance with the law.—Lamb, Adm'r v. Helm, Adm'x, 420.

11. *Administration—Section 13 of act—Words "other person"—Construction of.*—Section 13 of the Administration law (Wagn. Stat., p. 72,) provides that "if the validity of a will be contested or the executor be a minor or absent from

ADMINISTRATION, continued.

the State, letters shall be granted during the time of such contest, minority or absence, to some other person." *Held*, that a proper construction of the words "other person" would seem to be that a person other than, or different from the one charged with the execution of the will—whether named in the will or not—shall be appointed to take charge of the estate during the contest.—Lamb, Adm'r v. Helm, Adm'x, 420.

12. *Administration—Bond—Sureties—Additional—Release of former.*—The security contemplated by the 41st section of the Administration Law, is additional to that previously given, and does not have the effect of releasing the former sureties. The 39th section applies to an entirely different case, and does not apply to that contemplated by the 41st section. (State *ex rel.*, Glenn vs. Wright's Adm., 53 Mo., 479, affirmed.)—Haskell v. Farrar, et al., 497.

See Wills.

ADMISSIONS, see Engineer, 1; Conveyances 1; Practice, civil pleadings, 1.

ADULTERY, see Criminal Law, 1.

ADVERSE POSSESSION, see Ejectment.

AGENCY.

1. *Business commissions of clerk—Power of attorney—Conversion of funds drawn under—Borrowed money—Interest on, etc.*—In suit by a clerk for a proportion of the business profits, guaranteed to him by defendant, where it appeared that the latter had employed a third party to transact business for him in his absence, and that without the consent of plaintiff he had given him power of attorney to draw money, execute notes, etc., in defendant's name; *semble*, that money so taken out of the business by said third person, and not accounted for, could not be charged to the profit and loss account of the concern, but should be borne by the defendant personally. *Held*, also, that plaintiff not being required to furnish any part of the capital, defendant could not charge against plaintiff an *aliquot* portion of the interest upon funds borrowed by defendant to carry on the business.—Edwardson v. Garnhart, 81.

2. *Banks—Draft forwarded to defaulting correspondent—Responsibility of bank to owner—Measure of.*—Where a bank in this State receives for collection a draft payable in another State, and uses due diligence and forwards the draft to a proper correspondent at the place where the paper is made payable, with proper instructions for collection, its responsibility is at an end; and in case of default by its correspondent, it cannot be held liable to the owner, unless by some after act it makes itself responsible.—Daly v. Butchers' & Drovers' Bank, 94.

3. *Agent—Powers—Sale and payments.*—A power to sell goods includes a power to receive payment.—Rice, et al. v. Groffman, 435.

4. *Agency—Authority—Mistake, party causing should suffer consequent loss.*—Where a party has so acted, that another is led to believe in the right of a third person to act as his agent, if any loss occurs by reason of any act of the supposed agent, the loss must fall on him whose conduct caused the mistake.—Id.

5. *Contracts—Agency—Fraud—Deed of trust—Sale under—Purchase of trust property by agent of cestui que trust.*—An agreement between a purchaser, and a person acting as agent for both the *cestui que trust* and the vendee, under which the vendee and agent were to purchase in the name of the vendee for their joint benefit the property sold under a deed of trust, without making it bring the amount of the debt secured, when the property sold was of a value much greater than the amount of the debt, would be fraudulent, and would not be upheld by the courts.—Longuemare v. Busby, 540.

See Insurance, fire, 2; Frauds, statute of, 2; Partnership, 2.

AMENDMENTS, see Administration, 3; Judgment, 1; Practice, civil, 1; Practice, civil, pleading, 3.

ANDREW COUNTY, see Bonds, Andrew Co.

APPEAL.

1. *Practice, civil—Circuit Court—Appeal set aside—New trial, etc.*—The Circuit Court has the right at the same term at which an appeal is allowed to set aside the order granting the appeal, and then grant a new trial.—Kingman, et al. v. Abington, et al., 46.

2. *Justices' courts—Appeal—Sureties—Non-suit.*—Where defendant appealed from the judgment of a justice, and in the Circuit Court plaintiff took a voluntary non-suit, which was afterwards set aside without the knowledge or consent of the sureties on the appeal bond, and plaintiff had judgment against defendant and his sureties. *Held*, that the sureties were bound by the judgment.—Bailey v. Rosenthal, 385.

See Administration, 3; Costs, 1.

APPORTIONMENT, see Contracts, 5.

ARBITRATION AND AWARD, see Referee.

ATTACHMENT.

1. *Malicious attachment—Action for damages for—Participation of defendant in levy not necessary to.*—It is not necessary to the maintenance of an action for malicious attachment that defendant should have participated in the execution of the attachment process. If he makes out the affidavit maliciously, vexatiously and without probable cause, this is sufficient, without proof of further intervention on his part, to render him liable in damages for any resulting injury.—Walser v. Thies, 89.

2. *Malicious attachment, action for—Malice—Probable cause.*—In suit for malicious attachment, malice need not be expressly proved, but may be inferred from want of probable cause. And notwithstanding proof of probable cause for attachment, if from bad or malicious motives, oppressive and vexatious litigation is carried on, the action for damages will lie.—Id.

3. *Malicious attachment—Exemplary damages.*—In suit for malicious attachment, exemplary damages may be awarded.—Id.

4. *Malicious attachment and prosecution—Rules as to damages.*—The rules as to damages applicable to cases of malicious prosecution apply to actions for malicious attachment.—Id.

5. *Attachment—Plaintiff's bond may be sued on without plea in abatement—Damages for detention of money by garnishee.*—Under the statute of 1865, (Wagn. Stat., p. 189, § 42,) defendant in a suit by attachment, in case of judgment in his favor on the merits, may sue on the plaintiff's attachment bond, without having entered his plea in abatement. (State to use of Roe vs. Thomas, 19 Mo., 613.)

In such suit he may recover damages growing out of the detention by garnishment of money due him, not exceeding of course the legal rate of interest.—State v. Beldsmeier, et al., 226.

See Landlord and Tenant, 7; Garnishment.

ATTORNEY.

1. *Attorney—Power of to compromise claim.*—An attorney has no authority arising from his employment in that capacity, to compromise the claim of his client.—Spears vs. Ledergerber, 465.

AUCTIONEER, see Frauds, statute of, 2.

B.

BANKS AND BANKING.

1. *Banks—Draft forwarded to defaulting correspondent—Responsibility of bank to owner—Measure of.*—Where a bank in this State receives for collection a draft payable in another State, and uses due diligence and forwards the draft to a proper correspondent at the place where the paper is made payable, with proper instructions for collection, its responsibility is at an end; and in case of default by its correspondent, it cannot be held liable to the owner, unless by some after act it makes itself responsible.—Daley v. Butchers' and Drovers' Bank, 94.

See Revenue, 1.

BANKRUPTCY.

1. *Nat. bankr. law—Composition, what invalid.*—*Semble*, that an agreement, by which one creditor obtains seventy-five per cent. of his own claim, and agrees only to secure to other creditors 30 per cent., would be a violation of the national bankrupt law, and would not be enforced here any more than in the courts having special jurisdiction in bankrupt cases.—Claflin *et al.* v. Torlina, *et al.*, 360.

2. *Mechanics' liens—Bankrupt act of the United States.*—It was not intended by the United States Bankrupt Law to cut off or destroy liens or vested rights acquired under State laws, but rather to preserve all liens and enforce a distribution of the property of the bankrupt with reference to the rights of all, whether those rights were created by a statutory lien or otherwise. And a person entitled to a mechanic's lien under the laws of this State, has a right, notwithstanding the commencement of proceedings in bankruptcy, to perform all acts necessary to the final prosecution and perfection of his lien under the statutes of this State.—Douglas v. St. L. Zinc Co., *et al.*, 388.

3. *Mechanics' liens—Bankruptcy—Jurisdiction.*—When the property of a bankrupt under the United States Bankrupt Law is subject to a mechanic's lien, the bankrupt court may order the assignee to sell the property and pay off the lien out of the proceeds, or may order the property to be sold subject to the lien, and in that case the courts of the State whose statute gives the lien would have jurisdiction to ascertain and enforce the lien against the property, notwithstanding the proceedings in bankruptcy.—Id.

BILLS AND NOTES.

1. *Notes—Surrender, etc.—Consideration.*—The surrender and cancellation of a note is a sufficient consideration for another given in lieu thereof.—Meyers *v.* Van Wagoner, 115.

2. *Promissory notes—Deed of composition—Estoppel—Trust note.*—In an action by the holder against the indorser of a promissory note, where it appeared that the maker had entered into a deed of composition and release with his creditors, and that plaintiff had accepted its provisions, and nothing on the face of the note showed that it was held by plaintiff in trust, and it was treated by him as his individual property, he is estopped, so far as the maker is concerned, from after claiming that he held the note as guardian.—Eggemann v. Henschen, 123.

3. *Promissory note—Deed of release as to maker—Release of subsequent indorser.*—Where the holder of a note releases the maker, such release operates as a discharge of the indorser, and the fact that he assents to the release does not alter the case.—*Id.*

4. *Promissory Notes—Purchase after dishonor—Defenses, etc.*—The purchaser of a note after maturity takes it subject to all existing and prior equities.—Kellogg v. Schnaake, 137.

5. *Promissory note—Defense—Failure of consideration.*—An answer to a suit on a note which admits its execution, but alleges that it was "without any consideration whatever," sets up a good defense.—Williams v. Mellon, 262.

6. *Bills and notes—Holder for value before maturity presumed to be an innocent holder—Consideration, when can be impeached.*—The indorsee of negotiable paper for value before maturity is presumed to be an innocent holder, and must be so treated in the absence of proof to the contrary; and without such proof no evidence is admissible to impeach the consideration.—Greer v. Yosti, 307.

7. *Bills and notes—Consideration, what sufficient notice of fraud.*—The notice of fraud must be at least sufficient to put the purchaser on inquiry. Express notice is not indispensable; it will be sufficient if the circumstances are such as to strongly indicate that there was fraud in procuring the paper; but the circumstances must be of such a strong and pointed character as necessarily to cast a shade on the transaction and to put the holder on inquiry.—Id.

8. *Bills and notes—Innocent holder—Consideration.*—A negotiable note in the hands of an innocent purchaser for value before maturity is protected from all inquiry into the consideration.—Bennett, et al., v. Torlina, et al., 309.

BILLS AND NOTES, continued.

9. *Bill in equity to set aside sale of land made during rebellion for non-payment of note.*—During the late rebellion, citizens residing in the rebel states were alien enemies and could not sue in courts of the loyal States, but they might be sued therein by citizens of the latter States. Thus, where, after the President's proclamation of August, 1861, a note having been dishonored, certain land given under deed of trust to secure it was sold to satisfy the debt, a bill in equity will not lie on behalf of the maker to set aside the sale, on the ground that the plaintiff was, when the note matured and the land was sold, within the Confederate lines and cut off from all intercourse with the loyal States: it further appearing, that the plaintiff had voluntarily gone and remained South. The doctrine of Dean vs. Nelson, (10 Wall., 158,) has no application to such a case.

Held further, that the trustee having absolute power to sell on default, it was immaterial what were the circumstances or disabilities of the maker of the note.

Failure of notice to him, or even his previous death, would not invalidate the sale. The notice required by statute was not intended to apprise the grantor in the deed of the sale of the land.—DeJarnette v. DeGiverville, et al. 440.

10. *Note—Deed of trust—Sale under during war—Equity will interpose.*—During the late war, the citizens of the rebel States being alien enemies were subject to the laws of nations, under which one residing in the South would be prohibited from paying a note which fell due in the loyal States during that period. Hence, default in its payment under such circumstances would not authorize the sale of land given under deed of trust to secure it, and equity would interpose to set aside the sale.

The note and deed of trust must be construed as made subject to the implied power of the governments to which the parties belong, to interfere with or suspend it "*flagrante bello.*" Per Napton, J., Dissenting.—DeJarnette v. DeGiverville, et al., 440.

11. *Bills and Notes—Protest—Due diligence—Excuse for failure to protest.*—The question whether the maker of a promissory note had left his place of residence so that a demand of payment could not be made there; or whether he had a place of business in the city where he resided, where such demand could be made, are questions of fact for the jury.—Bartholow, et al. v. Barnard, et al., 550.

12. *Notes—Possession—Ownership.*— The possession of a note, not payable to bearer, nor indorsed in blank by a third person, is not even *prima facie* evidence of ownership.—Dorn v. Parsons, 601.

See Account Stated, 2; Husband and Wife, 2; Judgments, 9; Mortgages and Deeds of Trust, 3.

BILL OF PEACE.

1. *Land and land titles—Equity—Bill of Peace.*—Where the correctness of a particular boundary line between two tracts of land has been thoroughly and satisfactorily tried in a number of actions, extending through a considerable time, and the verdict and judgment have always been in favor of the correctness of such boundary; equitable relief will be properly granted at the instance of the persons maintaining the correctness of said boundary, by enjoining its assailants from further vexing and harrassing those asserting it by a suit at law: and this, even if the said actions so tried did not involve the same pieces of ground; provided they involve the same boundary and were between the same parties or their privies in estate.—Primm, et al. v. Raboteau, 407.

2. *Equity—Bill of peace—Boundary.*—Where a court of equity grants relief in response to the prayer of a pleading in the nature of a bill of peace it may effectuate its decree in their behalf, by requiring a disputed boundary to be surveyed and marked in a permanent manner.—Id.

BONDS, see Attachment, 5; Administration, 4, 5, 12; Mechanic's Lien, 7.

BONDS, ANDREW COUNTY.

1. *County railroad bonds—Andrew county—Interest on bonds, what lawful.*—In January, 1860, by the general law then in force, the county had power to issue bonds for the Platte County Railroad Company, bearing interest at the rate of ten per cent. These bonds were not governed by § 33 of the statute touching Railroads (R. C. 1855, p. 429), limiting the interest to seven per cent That section referred to special cases contemplated by § 31 of same act. The bonds of Andrew county were issued under different circumstances and a distinct and independent grant of power; and as no limitation was therein imposed as to the interest, it was competent to fix any rate of interest not prohibited by law.—Beattie v. Andrew County, 42.

BONDS, COUNTY, see Macon County.

BOUNDARIES, see Land and Land Titles, 11, 12.

BURDEN OF PROOF, see Wills, 2, 5.

BURGLARY, see Practice, criminal, 1.

C.

CHECK, see Revenue, 1.

CITY, see St. Louis, City of.

CLERK OF COUNTY, see Officers, 1.

COLOR OF TITLE, see Land and Land titles, 7.

COMMON CARRIERS.

1. *Common carriers—Liability for disposition of goods at the end of their line—Due diligence.*—Goods designed to be delivered at Vicksburg, Miss., were delivered at New York to a common carrier whose line extended only to St. Louis and were receipted for by the carrier, as shipped "via. St. Louis, care of St. Louis & Vicksburg Packet Co., for A, B. & C., Vicksburg, Miss." At the time of the arrival of the goods at St. Louis, there was no company or person in existence in St. Louis, or having an office or place of business there under the name of the St. Louis & Vicksburg Packet Co. The carrier thereupon, shipped the goods on a first class steamer on which it was usual and customary to ship goods from St. Louis to Vicksburg. The steamer was sunk on her way down and the goods partly lost, partly damaged and all detained. On suit against the carrier for such loss, damage and detention, *Held*, that it was proper for the carrier, having carried the goods to St. Louis, to store them or to forward them at once, as might be most expedient, regard being had to the nature of the goods, and that having, in the exercise of a sound discretion, forwarded them by a usual mode of transportation, the carrier's liability ceased.—Cramer, et al. v. Am. U. Ex. Co. & The Mer. Dispatch Co., 524.

2. *Common carriers—Forwarders—Notice to consignors or owners.*—A carrier who receives goods, as such, and forwards them to their destination from the end of his line in the exercise of a sound discretion, cannot be held responsible for want of notice of his action to the owner or consignor. Such responsibility would grow out of his duty as a forwarder, and could not be set up in a suit brought against him simply as a carrier.—*Id.*

COMMISSION MERCHANT, see Contracts, 2.

COMPROMISE, see Bankruptcy, 1.

CONFIRMATION, see Land and Land Titles, 5.

CONSIDERATION, see Bills and Notes, 1, 5, 6, 7, 8.

CONSIGNOR, see Common Carrier.

CONSTABLE, see Execution, 2.

CONSTITUTION OF MISSOURI, see Officers, 1.

CONTINUANCE, see Practice, civil, trials, 1; Practice civil, 3, 4; Referee, 1.

CONTRACTS.

1. *Waiver.*—Although in an agreement time is made of the essence of contract, still it may be waived by a subsequent understanding between the parties.—Estel, et al. v. St. L. & S. E. R. R. Co., 282.
2. *Contracts—Factors—Commission merchants—Rights of—Advances.*—Where merchandize is consigned to a commission merchant to be held and disposed of on account of the consignor, without any specific orders as to time and mode of sale, and the consignee makes advances or incurs liabilities on the consignment for the benefit of the consignor, the legal presumption is, that the consignee is clothed with the ordinary right of factors to sell, in the exercise of a sound discretion, at such time and in such a manner as the usage of trade and his general duty require, and to re-imburse himself for his liabilities out of proceeds of the sale; and the consignor has no right by subsequent orders, given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale except so far as respects any surplus not necessary for the re-imbursement of such advances or liabilities. And where the consignee has called upon the consignor to advance to him a sufficient sum to indemnify him against loss, and the consignor has failed to do so, the consignee has the undoubted right, in the exercise of a sound discretion to sell so much as is necessary for his protection, at the current rates; even though such sale be made at a lower rate than demanded by the consignor.—Howard, et al. v. Smith, 314.
3. *Contracts—Parol, additional to a written contract—Evidence.*—A contract was made in writing for the transportation of certain troops and officers, which did not expressly provide for their subsistence. *Held*, that a subsequent parol agreement fixing a price for such subsistence, was independent of and not inconsistent with such contract, and that evidence was admissible to prove it.—Van Studdiford, Trustee, v. Hazlett, 322.
4. *Contracts—Action for breach of—Evidence not admissible to show a different breach from that set up.*—Where suit is brought for damages for a specified breach of contract, evidence of a different and additional breach is not admissible.—Huston v. Forsyth Scale Works, 416.
5. *Contracts—Apportionment—Divisibility—Quantum meruit.*—A contractor who fails to comply with his contract, loses whatever damages such failure may occasion, and is not allowed, under any circumstances, to claim beyond the contract price; and at the same time, after deducting such damages and such as result from any inferiority of the work or materials to what is required by the contract, he is entitled to be paid for what his labor and materials are reasonably worth to the party using them; and this allowance is not based upon the contract by any theory of waiver by acceptance, but on the idea that the work is of value, and should be paid for. If there is no value there can be no recovery.—Yeats, et al. v. Ballentine, 530.
6. *Contracts—Breach of—Acceptance of work—Waiver, what will amount to.*—Where work and labor and materials have been expended in the production of an article not connected in any way with property belonging to the party at whose instance the work has been done, the latter is at liberty to accept it or not, and if he does accept, such acceptance is a waiver of any defense to the contract, based upon any defects in its performance. But where the work is done on property of the other party, so that its results cannot be separated from the necessary consequences of ownership, as work done on another's house or farm, the continued possession and use of such property by the owner is not a waiver of any such defense.—*Id.*
7. *Contracts—Agency—Fraud—Deed of trust—Sale under—Purchase of trust property by agent of cestui que trust.*—An agreement between a purchaser and a person acting as agent for both the *cestui que trust* and the vendee, under which the vendee and agent were to purchase in the name of the vendee for their joint benefit the property sold under a deed of trust, without making it bring the amount of the debt secured, when the property sold was of a value much greater than the amount of the debt, would be fraudulent, and would not be upheld by the courts.—Longuemare v. Busby, 540.

See Conveyance, 2; Frauds, statute of, 1; Guaranty, 1, 2; Infants, 2; Judgment, 2.

CONTRACTOR, see Damages, 3; Corporations, 1; Husband and Wife, 10, 11, 12; Insurance, fire; Insurance, life; Partnership, 2.

CONVERSION; See Agency.

CONVEYANCES.

1. *Conveyances—Cotemporaneous declarations.*—The declarations of parties made at the time of executing a deed and showing the intention of the parties in making it, may be competent, where the testimony does not involve the construction of the instrument.—Huth v. Carondelet M. R. & Dock Co., 202.

2. *Infant—Conveyance by—Acquiescence in after majority—How long necessary to work affirmance of deed.*—Where one who has made a conveyance during infancy, after becoming of age, does some act which is totally inconsistent with an intention to disaffirm, as receiving rent on a lease made in his infancy, after he becomes of age, an affirmance may be inferred from such act without regard to the lapse of time which has intervened after majority. But mere silence or inaction will not have the effect of a disaffirmance unless continued so long after attaining majority as to work a bar under the statute of limitations.—Id.

3. *Administrator—Real estate, sales of—Conveyance—Indefiniteness of description of land.*—In a deed to real estate made by an administrator, he described the land as 320 acres of land, "being parts of lots No. 6 and 12." In reality lot 6 contained 173 acres, and lot 12,374 acres. *Held*, that the deed was void for uncertainty in the description.—Jones, et al. v. Carter, 403.

See Administration, 7; Fraudulent Conveyances; Husband & Wife, 5, 6, 7 10; Land & Land Titles; Sheriff's Sale, 1, 2.

CORPORATIONS.

1. *Corporations, municipal—Sewers—Private property—Contracts—City Officers, authority of.*—The route of a sewer in the city of St. Louis, as established by ordinance, ran through the private property of an individual, who objected to its being laid there, and was unwilling to pay for it. Thereupon, the chairman of the sewer committee of the city council, the superintendent of sewers, and the city engineer agreed with him that if he would dedicate the portion of his land necessary for the construction of the sewer, the time of payment on his part would be extended for three years, and upon this agreement the dedication was made, and the work proceeded. Suit was brought by the contractor for the work, against the owner of the land so dedicated, within a year after the work was completed. *Held*, that, as the sewer ran through the private land of defendant, the city manifestly had no right to proceed till the same was condemned, or the owner's consent or relinquishment was obtained; therefore the agreement was valid and binding upon the parties, and constituted the only terms upon which the city had any authority for using the land; and although no special authorization of the officers to make such contract was shown, yet as a corporation acts only through its officers, and as these officers were charged with the specific power of constructing and superintending sewers, and the city availed itself of the benefit of their acts, a ratification would be presumed. The contractor had no rights against the defendant under illegal proceedings, and as the right of way was relinquished on certain conditions, his rights were subject to those conditions, and he had no right to bring his suit until the three years had expired.—St. Louis v. Lancaster, 298.

2. *Insurance, life—Capital Stock—Taxation, what property subject to.*—Section 40 of the act touching life insurance, (Wagn. Stat., 752) provides that the payment of certain fees by the respective companies, shall be "in lieu of all fees and taxes whatever, except that they may be taxed upon their paid up capital stock the same as other property in the county, for county and municipal purposes." *Held*, that this provision, properly construed, did not prevent the taxation of other property owned by the companies, over and above the par value of their capital stock. Such is not double taxation. But the non-taxation of such property would amount to an exemption, in violation of the State Constitution. (See Life Association of America vs. Board of Assessors, etc., 49 Mo., 512.)—St. L. M. L. Ins. Co. v. Bd. of Ass. of St. L. County, *et al.*, 503.

See Insurance, Fire, 4; Insurance, Life; Macon County, 1.

CORPORATIONS, MUNICIPAL, See Corporations, 1; St. Louis, & City of; Streets, 1.

COSTS.

1. *Judgment for costs a final judgment.*—Where a suit is dismissed, judgment against plaintiff for costs is a final judgment from which appeal will lie.—O'Connor v. Koch. 253.

COUNTER CLAIM, See Mechanic's Lien, 7; Practice, civil, trials, 1.

COURTS, ST. LOUIS CIRCUIT.

1. *St. Louis Circuit Court—Writ of error to General Term.*—Under the statute and the rules of court provided in pursuance thereof, a writ of error will lie from a final judgment of the Circuit Court of St. Louis County in special term, to the general term of that court.—St. L. M. L. Ins. Co. v. Bd. of Ass. of St. L. County, *et al.*, 503.

COURTS, COUNTY, See Macon County, 2; Officers, 1.

COURT, PROBATE, See Administration, 2, 3; Wills.

CRIMINAL LAW.

1. *Criminal law—Open and notorious adultery—What constitutes.*—Persons in order to be guilty of living together in open and notorious adultery, as meant by the statute (Wagn. Stat., p. 500, § 8), must reside together publicly, in the face of society, as if the conjugal relation subsisted between them, and their illicit intercourse must be habitual and not occasional.—State v. Crowner, 147.

See Practice, Criminal.

CRIMES & PUNISHMENTS, See Administration, 2; Macon County, 1.

CROPS, See Landlord & Tenant, 6, 7.

D.

DAMAGES.

1. *Damages, excessive—Intervention of Supreme Court.*—Before the Supreme Court can interfere on the ground of excessive damages it must appear that manifest injustice has been done.—Walser v. Thies, 89.

2. *Negligence, immediate and proximate cause of injury—Recovery in case of, negligence of plaintiff; of both parties.*—No one can recover for an injury of which his own negligence in part or in whole was the immediate and proximate cause. Where the negligence of both parties was the proximate cause, neither can recover.—Schaabs v. Woodburn Sarven Wheel Co., 173.

3. *Damages caused by falling of building while being re-built—Liability of owner and contractor.*—In suit for injuries received by an employee in making alterations in, and additions to, an old building; where the damages were shown to have resulted from inherent defects in the old wall, which the contractors were directed to make use of in the new building, or where the removal of floors and the construction of new walls were accomplished under the direction of defendant previous to the letting of the work to the contractors, and so unskillfully or negligently arranged as to have caused the injuries complained of, defendant will be liable, although at the time of the casualty the work had been let out to a contractor and was being carried on under his management and control.—Horner, Adm'r, v. Nicholson, 220.

4. *Railroads—Damages—Negligence, contributory.*—Although one injured by a railroad collision may have failed to exercise ordinary care and prudence, and thereby contributed remotely to the injury complained of, yet if the accident was directly caused by negligence of the company, the latter will be liable.—Burham v. St. L. & I. M. R. R. 338.

See Attachment, 1, 3, 4; St. Louis, 1, 2; Streets, 1.

DESCRIPTION, see Ejectment, 2; Estoppel, 4; Land and Land Titles, 11; Sheriff's Sales, 1, 2.

DEED OF TRUST, see Mortgages and Deeds of Trust; Trusts and Trustees.

DEDICATION TO PUBLIC USE, see Land and Land Titles, 2.

DEFAULT, see Judgment, 6.

DILIGENCE, see Bills and Notes, 11; Common Carriers, 1, 2; Practice, civil, New Trials, 4.

DIVORCE.

1. *Divorce—Desertion—Failure of husband to provide place of residence.*—The wife is bound to follow the fortunes of her husband, and live where he chooses to live and in the style and manner which he may adopt; and where a husband sues for a divorce on the ground of desertion, based on the fact that his wife remained away from him and refused his request that she should come and live with him, it is no defense, that at the time of such request he had no house to take her to, and that she was comfortably situated where she was.—Messenger v. Messenger, 329.
2. *Divorce—Desertion—Offer to return—Must be made in good faith.*—Where suit is brought for divorce upon the ground of desertion, an offer made by defendant to live with plaintiff is not sufficient to contradict the charge of desertion, unless made in good faith for the purpose expressed, and not as a device to defeat plaintiff's action.—Id.
3. *Divorce—Infants—Care and custody.*—A divorce was granted to the father and against the mother of young female children; the mother was entirely able and competent to take care of them, and bring them up, and educate them; *Held*, that although the law generally gives the father the care of such children, they should properly be left with the mother with a view to the best interests of the children. *Ordered*, that the mother should have the care and custody of the children until the further orders of the court.—Messenger v. Messenger, 329.

DOWER, see Husband and Wife, 8.

E.

EJECTMENT.

1. *Ejectment—Statute of Limitations—Possession for period of—Patent need not be proved, when.*—Possession of land in the owner or his grantors for more than thirty years accompanied with a claim of right, establishes a title which will warrant a recovery in ejectment, unless defeated by a better title set up by defendant. It is unnecessary in such case to go further and show title from the United States, where the Government is no party to the suit.—Davis v. Thompson, 39.
2. *Ejectment—Falsa demonstratio.*—In a suit in ejectment, it appeared that "A" had obtained a concession of certain lands in New Madrid from Baron De Carondelet, that he conveyed to plaintiff's grantor all his lot or lots in the town of New Madrid, which were at any time granted to him by the commandant of that place. *Held*, that in the absence of any extrinsic evidence showing that he was not the owner of another lot in New Madrid in addition to the above concession and granted by the commandant, the words "which were at any time granted to him by the commandant of the place," could not be rejected as a false demonstration in order to show that the same land passed by both grants.—Gitt v. Eppler, 139.
3. *Ejectment—Disputed boundary lines—Whether covered by certain deeds, question for jury*—In ejectment for land between disputed boundary lines, the question whether a deed under which plaintiff claimed covered the strip in controversy was held to be one of fact for the jury.—Barry v. Otto, 177.

See Estoppel, 2.

ELECTION.

1. *Elections—Official returns—Governor and Secretary of State cannot go behind.*—In counting votes for a Circuit Judge, neither the Governor nor the Secretary of State have any authority to go behind the returns officially certified to the Secretary.—State v. Townsley, 107.
2. *Quo warranto—Circuit Judge—Returns of election, correctness of—Issues touching.*—In *quo warranto* on the relation of the Attorney General to test the title of a Circuit Judge to his office, defendant averred generally that he was duly

ELECTION, continued.

elected. Plaintiff's replication set out specifically the returns from the counties comprising the circuit, and charged that the returns from a certain county had been excluded from the count. Defendant's rejoinder was a general denial of the averments of the replication—nothing more; *held*, that the correctness of the returns was not put in issue by the pleadings, and could not be enquired into.

In *quo warranto*, parties cannot go behind the official returns, unless the specific objections thereto be stated in the pleadings; there must be, *e. g.*, a specification of the number and names of the voters alleged to be illegal; general averments in reference thereto are insufficient.—Id.

EMBEZZLEMENT—See Administration, 2.

EMINENT DOMAIN.

1. *Eminent domain—Proceedings for condemnation of land—Exceptions filed out of time—Attempt at bargain with land owner—When need not appear.*—In proceedings for the condemnation of private property for public uses, in conformity with the act of March 10th, 1849, (Sess. Acts 1849, p. 593), as a general rule it must appear from the record that an attempt had been made to purchase the land of the owner, before it can be appropriated *in invitum*. But where the owner appears in court after the time for filing exceptions is past, and obtains leave to file them on condition of waiving all objections save as to the sufficiency of the damages, he cannot afterward avail himself of the failure of the record to show such attempt at bargain.—U. S. of America v. Reed, 565.

ENGINEERS.

1. *Engineer—Special tax bill—Substitution of name on bill.*—A special tax bill in which the name of the property owner originally inserted by the city engineer is stricken out and another added by the assignee instead, is inadmissible in evidence, and this is the case even although in suit on the bill against the party whose name is substituted, he admits that he owns the property mentioned in the bill.—Kefferstein v. Knox, 187.

2. *Engineer—Clerk, certificate, etc.*—It is competent for a city engineer to certify a tax bill upon a measurement made by his clerk. It is sufficient if the officer have official knowledge of the fact.—Id.

3. *Engineer.*—Is sole judge, of what.—Estel, et al. v. St. L. & S. E. R. R. Co., 282.

4. *Engineer—Special tax bill—Judgment in case of, should be special against property.*—In suit on a special tax bill for street improvements no general or personal judgment against the defendant can be rendered. The judgment should be a special one against the property.—Collins v. Cavender, 286.

See St. Louis, City of, 3.

EQUITY.

1. *Equity—Temporary injunction granted where title to property is in dispute.*—Courts of equity will not usually grant a perpetual injunction, in a case where the title to the premises is put in issue, and where from the evidence the title is in doubt; but will only grant a temporary injunction to restrain the parties until the title can be settled at law. But the Chancellor may hear evidence on this point, notwithstanding.—Lockwood v. Scott, 68.

2. *Judgment—Assignment of—Equity.*—An assignee of a judgment which has been compromised cannot enforce it against the defendant in the judgment. The assignee takes the judgment subject to all its equities. And, *a fortiori*, a bill in equity will not lie on behalf of the creditors of the assignee, to enforce it against the judgment creditor.—Bobb v. Taylor, 311.

3. *Land and land titles—Equity—Bill of Peace.*—Where the correctness of a particular boundary line between two tracts of land has been thoroughly and satisfactorily tried in a number of actions, extending through a considerable time, and the verdict and judgment have always been in favor of the correctness of such boundary, equitable relief will be properly granted at the instance of the persons maintaining the correctness of said boundary by en-

EQUITY, continued.
joining its assailants from further vexing and harassing those asserting it by a suit at law; and this, even if the said actions so tried did not involve the same pieces of ground; provided they involved the same boundary, and were between the same parties or their privies in estate.—Primm. et al. v. Raboteau, 407.

4. *Practice, civil—Trials—Testimony—Objections to—Grounds must be specifically stated, in legal or equitable actions.*—The rule requiring the grounds of objections to testimony to be specifically stated, applies alike to legal and equitable actions; and objections, the grounds of which are not specifically stated, are properly disregarded by the court.—Id.

5. *Land and land titles—Boundaries—Equity.—Semble,* that equity will interfere to ascertain and fix boundaries where the rights of a large number of persons are affected and a confusion of boundaries has been occasioned by lapse of time, accident or mistake, and a necessity therefore arises to adjust such conflicting claims and thus prevent interminable litigation.—Id.

6. *Bill in equity to set aside sale of land made during rebellion for non-payment of note.*—During the late rebelion, citizens residing in the rebel states were alien enemies and could not sue in courts of the loyal States, but they might be sued therein by citizens of the latter States. Thus, where, after the President's proclamation of August, 1861, a note having been dishonored, certain land given under deed of trust to secure it was sold to satisfy the debt, a bill in equity will not lie on behalf of the maker to set aside the sale, on the ground that the plaintiff was, when the note matured and the land was sold, within the Confederate lines and cut off from all intercourse with the loyal States; it further appearing that the plaintiff had voluntarily gone and remained South. The doctrine of Dean v. Nelson, (10 Wall. 158) has no application to such a case.

Held, further, that the trustee having absolute power to sell on default, it was immaterial what were the circumstances or disabilities of the maker of the note.

Failure of notice to him, or even his previous death, would not invalidate the sale. The notice required by statute was not intended to apprise the grantor in the deed of the sale of the land.—DeJarnette v. DeGiverville, et al., 440.

7. *Note—Deed of trust—Sale under during war—Equity will interpose.* During the late war, the citizens of the rebel States being alien enemies were subject to the laws of nations, under which one residing in the South would be prohibited from paying a note which fell due in the loyal States during that period. Hence, default in its payment under such circumstances would not authorize the sale of land given under deed of trust to secure it, and equity would interpose to set aside the sale.

The note and deed of trust must be construed as made subject to the implied power of the governments to which the parties belong, to interfere with or suspend it "*flagrante bello.*"—PER NAPTON, J. DISSENTING.—Id.

8. *Equity—Practice, civil—Motions—Relief.*—Where a motion is made under a statute for a particular remedy therein provided, it is not competent for the court, on that motion, to grant other equitable relief which is not embraced in or relied on in the motion.—Schneider v. Meyer, et al., 475.

See Administration, 3; Bills and Notes, 4; Garnishment, 1; Injunction.

ESTOPPEL.

1. *Mechanic's lien—Lease-hold estate—Delivery of lease—What facts estop denial of.*—Where the owner of land stated to a house-builder that he had leased certain premises to a third party, and the builder thereafter erected a hotel on said ground, with the knowledge of the owner and without objection on his part; but on the contrary it appeared that the owner furnished said lessee with money to aid in erecting the hotel, and the lease was manifestly given with a view to such improvement; these facts, whether the lease was delivered or not, would estop the lessor from denying the delivery. And *semble,* that the fact that the owner, some months after the commencement of the building, and when the lessee's responsibility became questionable, took from him a written surrender of the lease, would also estop him from asserting its non-delivery.—Allen v. Sales, et. al., 28.

ESTOPPEL, continued.

2. *Estoppel—Not the basis of title—May be used in rebuttal by plaintiff, when.—Semble*, that an estoppel *in pais* can never form the basis of a title on which ejectment will lie. But *held*, that in ejectment founded on a sheriff's deed which conveyed a certain lease-hold estate as that of defendant in the execution, where the owner of the land sets up as a defense the non-delivery of the lease, such defense may be rebutted by proof of acts on the part of the owner constituting estoppel *in pais*. In such case the claim of estoppel is used defensively and not as the creation of a title.—Id.

3. *Promissory notes—Deed of composition—Estoppel—Trust note.*—In an action by the holder against the indorser of a promissory note, where it appeared that the maker had entered into a deed of composition and release with his creditors, and that plaintiff had accepted its provisions, and nothing on the face of the note showed that it was held by plaintiff in trust, and it was treated by him as his individual property, he is estopped so far as the maker is concerned, from after claiming that he held the note as guardian.—Eggemann v. Henschen, 123.

4. *Estoppel—Improvements upon land, etc.*—A deed of land, although containing a false description of the property, when taken in connection with the fact that for fifteen years after its execution, the grantor lived in sight of the premises and saw valuable improvements erected thereon, was held sufficient to work an estoppel as against the grantor.—Thomas v. Pullis, 211.

5. *Mechanics' lien—Bond against liens—Liens filed by surety on bond—Estoppel—Counter-claim—Injunction.*—A. advanced money to B. to enable B. to improve certain land, taking a deed of trust on the land, and a bond from C., the contractor, with D. as surety, that the buildings to be erected would be delivered to B. free from mechanic's liens. E. afterwards purchased the property and took an assignment of the bond. D. subsequently filed a lien for materials delivered to C. for the builders. *Held*, that D. was not estopped by the bond from filing his lien; that if A. lost any part of his money by reason of such lien being filed, the damage so sustained might be set up as a counter-claim. *Semble*, that if D. was about to enforce a lien, which endangered A's. debt, A. might enjoin its collection till his debt was paid.—Hartman v. Berry, *et al.*, 487.

EVIDENCE.

1. *Evidence—Writing—Verbal stipulation cannot contradict.*—The doctrine is well established that no antecedent or contemporaneous verbal stipulations are admissible to contradict or vary the terms of a written instrument.—Helmrichs v. Gehrke, 79.

2. *Practice, civil—Witnesses—Cross-examination of—How far may be carried.*—If a witness is sworn and gives some evidence, however informal and unimportant, he may be cross-examined in relation to all matters involved in the case. St. L. & I. M. R. R. v. Silver, 265.

3. *Practice, civil—Trials—Testimony—Objections to—Grounds must be specifically stated in legal or equitable actions.*—The rule requiring the grounds of objection to testimony to be specifically stated, applies alike to legal and equitable actions; and objections, the grounds of which are not specifically stated, are properly disregarded by the court.—Primm, et al. v. Raboteau, 407.

4. *Contracts—Action for breach of—Evidence not admissible to show a different breach from that set up.*—Where suit is brought for damages for a specified breach of contract, evidence of a different and additional breach is not admissible.—Huston v. Forsyth Scale Works, 416.

5. *Evidence—Age and pedigree—Family records—General Repute.*—On questions of age and pedigree, family records are admissible in evidence. General repute with the family is also sometimes admissible in such cases.—Beckham v. Nacke, 546.

See Administration, 1; Contracts, 3; Conveyances, 1; Engineer, 1; Land and Land Titles, 2, 8; Partnership, 3; Practice, civil, new trials, 4; Practice, civil; Trials, 8, 11, 15; Practice, Sup. Ct., 2, 3, 6, 7, 8.

EXCEPTIONS, BILL OF, see Practice, Supreme Court 1.

EXECUTION.

1. *Practice, civil—Motion for a new trial—Execution.*—It is error to issue execution before motion for a new trial is determined.—Stephens v. Brown, 23.

2. *Replevin vs. Constable's Adm'r—Competency of plaintiff as witness—Constr. Stat.—Surplus fund—Creditors.*—In replevin by a third party against a constable for goods seized under execution, where the constable died after suit was commenced and his administrator was substituted as a party, the plaintiff then ceased to be a competent witness under the statute. (Wagn. Stat. 1371-2, § 1.)

In such proceeding, judgment being given in behalf of defendant for the value of the property, any surplus after satisfying the execution debt, may be seized by the other creditors. Plaintiff in the replevin cannot hold it.—Blobaum v. Gambs, Adm'r, 183.

3. *Execution creditor—Appropriation of money in hands of sheriff to—Levy upon, under writ against execution creditor.*—A sheriff who has received money on an execution, cannot, before the same is paid over or appropriated, attach or levy upon the money so held, on a writ issued against the execution creditor. If in such case the sheriff should make the proper appropriation, his act in so doing might be upheld. But he is not bound to appropriate the money but may return his executions and money into court for its disposition of the same.—State *ex rel.*, v. Taylor, *et al.*, 492.

See Administration, 10; Sheriff's Sales, 1.

EXECUTORS, see Administration.

F.

FACTORS, See Contracts, 2.

FAMILY RECORDS, See Evidence, 5.

FERRY, See Injunction, 1.

FORCIBLE ENTRY & DETAINER, See Landlord & Tenant, 2.

1. *Forcible entry and detainer—Judgment for rents and profits—Joint judgment, when proper.*—Ordinarily, in proceedings under the forcible entry and detainer act, where one of the defendants comes into possession subsequently to the other, and holds it for a shorter time, a joint judgment for rents and profits would be improper. But where they are put in possession in pursuance of one general design and are acting in concert to hold the possession as agents of a third party, so as to shift the burden of proving title to the property, such judgment will not be held to be error.—Kingman, et al., v. Abington, et al., 46.

FORWARDER, See Common Carrier.

FRAUD, See Account Stated, 1; Agency, 5; Bills & Notes, 7; Practice, Civil, Trials, 14.

FRAUDS, STATUTE OF.

1. *Statute of frauds—Verbal agreement, when not within.*—The question whether or not a verbal contract comes within the statute of frauds, depends wholly upon the agreement. If the party agrees to be originally bound, the contract need not be in writing, but if his agreement is collateral to that of the principal contractor, or is that of a guarantor or a surety for another, then the agreement must be in writing.—Barker v. Scudder, 272.

2. *Sales—Statute of frauds—Auctioneer—Memoranda—Names of parties—Principal and agent—Description of property.*—The memorandum of a sale of land by an auctioneer, as made by his clerk, was prefaced by an advertisement, pasted in the book, which contained the name of the tract sold, which was well known, and a partition of which was recorded, and stated that it was sold by order of the heirs of the estate to which it belonged, naming it; de-

FRAUDS, STATUTE OF, continued.

scribed its location in general terms, and referred to lithographic plats to be ready at the day of sale. On the margin was a note, "sold on account of A." On the sale, the clerk made a minute immediately following the advertisement as follows: "Lots 1 and 2, C. D," (the name of the purchaser,) "111, $15, $1,665.00." It was admitted by the pleadings, that the auctioneers were the agents of the heirs of said estate. *Held*, that the note on the margin did not indicate that the memorandum of sale showed an agreement of the purchaser with A.; it might show that A. had an interest without necessarily implying that he was the contracting party; that the memorandum and the advertisement taken together sufficiently disclosed the principal for whom the auctioneers acted, and if they did not, parol evidence was admissible for that purpose; that the name of the tract being well known, and by its very title referring to a partition and plat which were of record, was a sufficient description of the property for the purposes of the memorandum; and that the writing of the name of the purchaser by the auctioneer's clerk was a sufficient signature under the Statute of Frauds.—Briggs v. Munchon, 467.

FRAUDULENT CONVEYANCES.

1. *Fraudulent conveyances—Change of possession, what necessary under the statute.*—To render a sale of personal property valid as against creditors, etc., it must be followed by an actual and continued change of possession, and a change so open, notorious and unequivocal as to apprise the community that the vendor had ceased to be the owner of the property. (See Wagn. Stat., 281, § 10; Claflin vs. Rosenburg, 42 Mo., 439; Lessem vs. Herriford, 44 Mo., 323.) —Bishop v. O'Connell, et al., 158.

2. *Sale of personal property—Change of possession—Reasonable time—What is.*—What will be a "reasonable time" for change of possession of personal property after sale, as meant by the statute (Wagn. Stat., 281, § 10,) must be determined by the circumstances of each case. No definite rule can be laid down.—*Id.*

G.

GARNISHMENT.

1. *Garnishment—Trust property not subject to.*—The statute touching garnishment is essentially legal and not equitable in its nature and procedure; and the rights, credits and effects in the hands of the garnishee which are subject to attachment are such as are not encumbered with trusts, and such as may be delivered over, or paid to the officer under the direction of the court, free from the encumbrances of a trust.

Where a conveyance in trust is made in fraud of creditors, a different rule prevails, for the instrument being void, the property is subject to attachment under simple law process.—Lackland v. Garesche, 267.

GRANTS FROM UNITED STATES.

1. *Deeds—Grants from United States—What certainty required in.*—The same certainty of description is not required in deeds from the government to individuals, or between grantor and grantee, as in case of sheriffs' deeds and other proceedings *in invitum*. In the former, parol evidence is allowed to explain and identify and locate.—Long v. Higginbotham, 245.

See Land & Land Titles, 5.

GUARANTY.

1. *Guaranty, verbal—What necessary to constitute.*—To constitute a verbal guaranty or personal undertaking, it is unnecessary that the word "guaranty" should be used. But is sufficient if, in view of all the circumstances attending the transaction, the ingredients necessary to constitute such a guaranty, viz.: the intention of the one party that his affirmation should operate as an inducement to the other party to buy or receive the thing, and the acceptance of a reliance upon such inducement by the latter, be shown to exist.—Barker v. Scudder 272.

GUARANTY, continued.

2. *Guaranty—Notice of non-payment—Unnecessary, when.*—Where one knowing of the existence of certain notes personally guarantees their payment, notice of non-collection is not necessary in order to bind him. The extent of his obligations in such case is not within the peculiar knowledge of the opposite party, so that information touching the same ought to be communicated to him; but he has the means of knowledge at his own command.—Id.

See Frauds, Statute of, 1.

GUARDIAN & WARD, See Infants 1.

H.

HOME MUT. FIRE & MARINE INS. CO.—See Insurance, Fire, 3, 4.

HUSBAND AND WIFE.

1. *Married woman—Separate estate, etc.*—As to her separate estate, a married woman is *feme sole.*—Meyers v. Van Wagoner, 115.

2. *Married woman, note of—Binds separate estate, when.*—The delivery of her note by a married woman, raises the presumption that she intends to bind her separate estate.—*Id.*

3. *Administrator must determine for himself whether fund belongs to estate of deceased—Parol evidence, when proper, etc.*—An agent credited to the account of the husband the proceeds derived from the sale of certain lands belonging to the wife, and turned the sum over to the administrator of the husband, *Held,* that the administrator properly refused to be governed by the books of the agent, and was right in not charging himself with that amount. He was authorized to determine for himself to what fund it belonged. And the fact might be shown by parol evidence.—Pattison, Adm'r v. Coons, 169.

4. *Husband and wife—Wife may answer separately, when.*—Under the statute (Wagn. Stat., 1001, § 8) a married woman may answer separately although her husband be co-defendant.—Siemers v. Kleeburg, 196.

5. *Married woman—Mortgage on separate property—Acknowledgment—Relinquishment of dower, etc.*—The certificate of acknowledgment of a married woman to a mortgage given by her on her separate property, is not void by reason of the fact that she is therein made to relinquish her dower. Such clause may be rejected as surplusage.—Id.

6. *Married woman—Acknowledgment by in 1859 before notary.*—Under the act of February 15th, 1864, amendatory of § 37, ch. 32, R. C. 1855, (Adj. Sess. Acts 1863-4, p. 27,) the acknowledgment of a married woman, dated in 1859, was good although taken before a notary public. (See Mitchell vs. People, 46 Mo., 204.)—Id.

7. *Feme covert—Mortgage of separate estate—Acknowledgment—Unnecessary when.—Semble,* that if a *feme covert* signs a promissory note, her separate estate will be bound, although her deed of trust given upon such estate to secure the note was unacknowledged.—Id.

8. *Married woman—Contract—Consideration.*—The contract of a *feme covert* in order to bind her separate estate need not be based upon a consideration moving directly to her.—Id.

9. *Married woman—Mortgage by charge upon rents, etc., when—Trustee should be party, when.*—A mortgage by a married woman upon property held by her trustee will be construed in equity as a charge upon the rents and profits arising therefrom in the hands of the trustee. And in suit to foreclose such mortgage, and for general relief, the trustee should be joined as a party.—Id.

10. *Married women—Contracts—Separate estate.*—It is the well settled law of this State, that if a married woman, who is possessed of real estate for her sole use, execute a promissory note, it will be presumed that she intended to charge her separate property with the payment thereof. And it is not necessary that the instrument which she executes, whereby she promises to pay a sum of money

HUSBAND AND WIFE, continued.

should assume the shape of a promissory note. Her intention to bind her separate estate will, in the absence of anything to the contrary, accompany the act as well in one case as the other. In the contemplation of equity a married woman is as completely clothed, so far as her separate property is concerned, with the *jus disponendi*, as any other property owner.—DeBaun v. Van Wagoner, *et al.*, 347.

11. *Husband and wife—Insurance policy for wife's benefit—Wife may sue in her own name.*—Where an insurance policy showed that it was effected by the husband for the benefit of his wife, the statute (Wagn. Stat., p. 1000, § 3) would not preclude the wife, after his death, from suing upon it in her own name. (Rogers v. Gosnell, 51 Mo., 466, affirmed.)—McComas v. Cov. M. Ins. Co. 573.

12. *Husband and wife—Necessaries—Notice to cease furnishing, etc.—Husband bound for afterward, when.*—In order to bind the husband for goods sold the wife, after the seller has had notice to discontinue the sales, the latter must show, not only that the goods are necessaries, but that the husband has failed to make an adequate supply of them.—Barr v. Armstrong, 577.

See Mortgages, 3; Wills, 6; Trusts and Trustees, 2.

I.

INFANTS.

1. *Constitution—Title of infant—Power of legislature to pass.*—The legislature has power to authorize a guardian or administrator, or any one else named in the act, to pass the title of an infant, or to compromise an unsettled claim upon such terms as the parties may agree upon.—Thomas v. Pullis, 211.

2 *Infancy—Ratification of deed after majority—Acquiescence.*—The mere inaction of an infant after coming of age will not constitute a confirmation of a deed made by him during infancy. (Huth vs. Carondelet & Marine R'way Co., *ante*, p. 202.)—Thomas v. Pullis, 211.

3. *Divorce—Infants—Care and custody.*—A divorce was granted to the father and against the mother of young female children; the mother was entirely able and competent to take care of them, and bring them up and educate them; *Held*, that although the law generally gives the father the care of such children, they should properly be left with the mother with a view to the best interests of the children. *Ordered*, that the mother should have the care and custody of the children until the further orders of the court.—Messenger v. Messenger, 329.

4. *Marriage—Infants—Liability of Magistrate—Defense.*—An honest mistake by a magistrate performing a marriage ceremony as to the age of a person whom he married, is no protection against the penalty affixed by law to the performance of such ceremony when the persons married are minors, without the consent of their parents or guardians.—Beckham v. Nacke, 546.

See Conveyances, 2.

INJUNCTION.

1. *Injunction—Ferry privilege—Conflicting charters of Missouri & Kansas Legislature.*—In bill to enjoin defendant from ferrying the Missouri River between this State and Kansas, within a certain territory to which plaintiff claimed the exclusive franchise, solely by virtue of the Act passed by this State, Nov. 17th, 1855, demurrer held well taken. *Non Constat*, but that under an Act passed by the Legislature of Kansas, defendant had a similar privilege of ferrying from the opposite shore.—Challiss v. Davis, 25.

2. *Equity—Temporary injunction granted where title to property is in dispute.*—Courts of equity will not usually grant a perpetual injunction, in a case where the title to the premises is put in issue, and where from the evidence the title is in doubt; but will only grant a temporary injunction to restrain the parties until the title can be settled at law. But the Chancellor may hear evidence on this point, notwithstanding.—Lockwood v. Scott, 68.

INJUNCTION, continued.

3. *Injunction against mining by a trespasser who is insolvent.*—It has long been settled that where a mere trespasser digs into and works a mine to the injury of the owner, an injunction will be granted; and more particularly is this true when the trespasser is insolvent.—Id.

See Administration, 3; Landlord and Tenant, 7; Mechanic's Lien, 7.

INSTRUCTIONS, see Practice, civil, Trials.

INTEREST, see Bonds, Andrew County.

INSURANCE, FIRE.

1. *Insurance—Acceptance of premium—Delivery of policy—Notice of fire—Payment of premium—Waiver—Instructions.*—When an Insurance Company accepts the premium and delivers the policy, the contract to insure is complete and executed; and it relates back to the day when the application was filed and the policy made out and signed; and the insured is under no obligation to notify the company that the building insured has been destroyed by fire in the meantime. And the premium need not be paid in order to bind the contract, where the company waives its right to immediate payment and extends credit to the assured. The obligation of the company remains notwithstanding, and the question of such waiver is one of fact to be submitted to the jury by appropriate instructions.—Baldwin v. Chouteau Ins. Co., 151.

2. *Fire insurance—Delivery—Agency.*—Delivery of plats of a building proposed to be insured to the agent of an insurance company, held delivery to the company.—Moore, Assignee, v. Atlantic M. Ins. Co., 343.

3. *Home Mutual Fire Ins. Co.—Cancellation of policy—Resolution of board—Notice—Company bound notwithstanding, when.*—By the terms of the charter of the Home Mutual Fire and Marine Insurance Company, of St. Louis, before the cancellation of any policy could take effect, it was to be entered on the books of the company; and it retained the right to make assessments up to that time. *Held*, that without such step the company would be liable to a policy-holder in case of loss by fire, notwithstanding the fact that a resolution had been adopted by the board ordering the secretary to notify the policy-holder that the company would discontinue its risk, and the fact that the resolution was transmitted by that officer, together with notification that the policy was thereby canceled, etc.—Landis v. Home M. F. & M. Ins. Co., 591.

4. *Corporations—Fire Insurance—Home Mutual—Limitation as to time of beginning suit.*—The charter of the Home Mutual Fire and Marine Insurance Company, of St. Louis, by virtue of a section adopted in 1845 and printed on its policies as a part thereof, provided that in case of loss by fire, the injured party should "present his claim to be adjusted and determined by the company, as to the amount to be paid him," etc. If not satisfied he was authorized to sue within a specified time and not afterward. *Held*, that the limitation as to time of suit had no application to a case where the company claimed a total exemption from all liability. In such case, the only limitation would be the bar of the general statute.

The decision in Keim v. Home Mut. F. & M. Ins. Co., (42 Mo. 38) turned upon an amendment adopted in 1857, and forming no part of the policy under consideration.—Id.

INSURANCE, LIFE.

1. *Insurance, life—Capital stock—Taxation, what property subject to.*—Section 40 of the act touching life insurance, (Wagn. Stat. 752) provides that the payment of certain fees by the respective companies, shall be "in lieu of all fees and taxes whatever, except that they may be taxed upon their paid up capital stock the same as other property in the county, for county and municipal purposes." *Held*, that this provision, properly construed, did not prevent the taxation of other property owned by the companies, over and above the par value of their capital stock. Such is not double taxation. But the non-taxation of such property would amount to an exemption, in violation of the State Constitution. (See Life Association of America v. Board of Assessors, etc., 49 Mo., 512.)—St. L. M. L. Ins. Co. v. Bd. of Ass. of St. L. County, *et al.*, 503.

INSURANCE, LIFE, continued.

2. *Husband and wife—Insurance policy for wife's benefit—Wife may sue in her own name.*—Where an insurance policy showed that it was effected by the husband for the benefit of his wife, the statute (Wagn. Stat., p. 1000, § 3) would not preclude the wife, after his death, from suing upon it in her own name. (Rogers v. Gosnell, 51 Mo. 466, affirmed.)—McComas v. Cov. Mut. Ins. Co., 573.

J.

JEOFAILS, see Administration, 3; Judgment, 1; Practice, civil, 1.

JUDGMENT.

1. *Judgment—Clerical omission in—Corrected at subsequent term, how—Interlineations.*—Where a clerk is ordered by the court at a subsequent term to supply a clerical omission in the record of a judgment by an entry *nunc pro tunc*, the proper course would be to enter anew in the proceedings of that term the entire judgment as corrected; and the action of the clerk in supplying the omitted part of the judgment, by an interlineation in the record of the preceding term, would be loose, irregular and reprehensible. But *semble*, that such improprieties of the clerk would not render the judgment a nullity.—Allen v. Sales, et al., 28.

2. *Judgment—One rendered on two counts not ground for reversal, when.*—*Semble*, that where an action was founded upon one continuous account for services for two years, the contract for the second year being only a slight modification of the original agreement, one judgment rendered on both counts would not be ground for reversal.—Edwardson v. Garnhart, 81.

3. *Special tax-bills—Personal and general judgment on.*—In suit on a special tax-bill, the rendition of a personal or general judgment against defendant is error.—Strassheim v. Jerman, 105.

4. *Judgment for costs a final judgment.*—Where a suit is dismissed, judgment against plaintiff for costs is a final judgment from which appeal will lie.—O'Connor v. Koch, 253.

5. *Engineer—Special tax bill—Judgment in case of should be special against property.*—In suit on a special tax bill for street improvements no general or personal judgment against the defendant can be rendered. The judgment should be a special one against the property.—Carlin v. Cavender, 286.

6. *Judgment—Default—Setting aside, matter of discretion with trial court.*—Whether application to set aside judgment by default on the ground that counsel, when the case was called, was disposing of a case in another court, should be granted, held a question to be determined by the trial court in the exercise of a sound discretion. (See Jacob vs. McLean, 24 Mo., 40.)—Griffin v. Veil, 310.

7. *Judgment—Assignment of—Equity.*—An assignee of a judgment which has been compromised cannot enforce it against the defendant in the judgment. The assignee takes the judgment subject to all its equities. And, *a fortiori*, a bill in equity will not lie on behalf of the creditors of the assignee, to enforce it against the judgment creditor.—Bobb v. Taylor, et al., 311.

8. *Judgment—Satisfaction of—Notes given for.*—A note given by a judgment debtor to the judgment creditor for the amount of the debt, but designed only to fix the time for payment, and which being unpaid at maturity is returned to the maker, is not a satisfaction of the judgment; and the co-defendants of the debtor, against whom judgment has also been rendered, are not entitled, on account of said note, to have the judgment entered as satisfied. The delivery of such note to plaintiff is not a satisfaction of the judgment either at law or in equity.—Schneider v. Meyer, et al., 475.

See Administration, 2; Forcible Entry and Detainer, 1; Mechanics Lien, 2, 3; Sheriff's Sale, 1; Special Taxes, 2, 3.

JURISDICTION.

1. *Mechanics' lien—Bankruptcy—Jurisdiction.*—When the property of a bankrupt under the United States Bankrupt Law is subject to a mechanic's lien, the bankrupt court may order the assignee to sell the property and pay off the lien out of the proceeds, or may order the property to be sold subject to the lien, and in that case, the courts of the State whose statute gives the lien, would have jurisdiction to ascertain and enforce the lien against the property, notwithstanding the proceedings in bankruptcy.—Douglas v. St. Louis Zinc Co. et al., 388.

See Mechanic's Lien, 5.

JURY.

1. *Juryman—What opinion renders incompetent.*—The mere fact that a juryman has formed an opinion does not, of itself, render him incompetent.

To have that effect, the opinion must be such as might influence his judgment.

In suit on a policy of life insurance, where the company in its defense denied all responsibility and refused to pay anything, such defense amounts to a waiver of notice and proof of death; and where such defense is interposed to a suit on a policy which requires the insurance to be paid within sixty days after notice and proof of loss, the sum will be held due at that period after the death.—McComas v. Cov. Mut. Ins. Co., 573.

See Referee, 1; Practice, civil, Trials, 3, 6.

JUSTICE'S COURT.

1. *Justices' courts—Appeal—Sureties—Non-suit.*—Where defendant appealed from the judgment of a justice, and in the Circuit Court plaintiff took a voluntary non-suit which was afterwards set aside without the knowledge or consent of the sureties on the appeal bond, and plaintiff had judgment against defendant and his sureties, *Held*, that the sureties were bound by the judgment.—Bailey v. Rosenthal, 385.

L.

LAND COMMISSIONER, see St. Louis, City of, 1.

LAND AND LAND TITLES.

1. *Ejectment—Falsa demonstratio.*—In a suit in ejectment, it appeared that "A." had obtained a concession of certain lands in New Madrid from Baron De Carondelet, that he conveyed to plaintiff's grantor all his lot or lots in the town of New Madrid, which were at any time granted to him by the commandant of that place. *Held*, that in the absence of any extrinsic evidence showing that he was not the owner of another lot in New Madrid in addition to the above concession and granted by the commandant, the words "which were at any time granted to him by the commandant of the place," could not be rejected as a false demonstration in order to show that the same land passed by both grants.—Gitt v. Eppler, 139.

2. *Land—Dedication of to public use—Alley in rear of premises—Taxes and repairs on, paid by owner—Use of by public in connection with proprietor—Intention to dedicate—User.*—To constitute a valid dedication of land to the public there must be a clear intention on the part of the owner to dedicate; which may be established in various modes, some of which are provided by statute and others by such acts or declarations *in pais* as are satisfactory evidence of such design; and there must be an acceptance of such dedication by the public, either by *user* for a length of time more or less according to circumstances, or by its adoption by the public authorities.

The owner of land in St. Louis on which certain dwelling houses were built, left a way through the rear of the premises and connecting with a public alley, wide enough for the passage of vehicles, which space was at all times used by the tenants for taking in coal, supplies and the like, and removing dirt, etc. The city never exercised control over the passage, or declared it to be a public alley; but the owner when occasion required had it closed up against the pub-

LAND AMD LAND TITLES, continued.

lic. *Held*, that although the public had for many years frequently used the alley, as a matter of convenience in passing to and fro, such facts did not constitute a dedication of the alley to the public, or an acceptance of a dedication by the public. The use by the community in such case was not an adverse but merely a permissive use in connection with, and in subordination to, that by the tenants. Hence the length of time through which the way was so used by the public would be of no importance.—Brinck v. Collier, 161.

3. *Limitations, statute of—Adverse possession—Action of ejectment by possessor—Title of Government, presumption as to.*—Ten years adverse possession, except as against the Government and parties laboring under disabilities, is not only a bar under the statute of limitations, but creates in the possessor an affirmative title under which he may maintain ejectment. And such possession will raise a presumption that the title has emanated from the Government and vested in the holder.—Barry v. Otto, 177.

4. *Ejectment—Disputed boundary lines—Whether covered by certain deeds, question for jury.*—In ejectment for land between disputed boundary lines, the question whether a deed under which plaintiff claimed covered the strip in controversy was held to be one of fact for the jury.—Id.

5. *Land titles—Confirmation under act of Congress, good as against subsequent grant, etc.*—A confirmation of land made in 1811, under the act of Congress of March 3rd, 1807, accompanied with a survey of said confirmation in 1845 and a certificate for patent, is good as against a grant from Congress of the same land made in 1866. At the date of said grant the United States had no title to the land except a bare legal title. The equitable title was in the confirmee; and the legal title under our statute would in such case enure to the owner of the equitable one.—Le Beau v. Armitage, et al., 191.

6. *Land titles—Title bought by vendee to defeat vendor.*—It is the settled law of this State that a vendee may buy up a title antagonistic to that of his vendor, and set up the title so bought to defeat that of his vendor.—Huth v. Carondelet M. R. & Dock Co., 202.

7. *Land titles—Possession of part with claim of the whole—Adverse possession connected with deed.*—The doctrine of constructive possession which follows the title where there is no adverse possession, is applied to one who takes actual or corporeal adverse possession under color of title, and he is held to be possessed of the contiguous land covered by the instrument under which he enters and which he claims by virtue of such an instrument. But such possession is never based upon a claim merely. There must be a deed purporting to convey the whole, or some proceeding or instrument giving color and defining boundaries as well as actual possession of a part.—Long v. Higginbotham, 245.

8. *Deeds—Grants from United States—What certainty required in.*—The same certainty of description is not required in deeds from the government to individuals, or between grantor and grantee, as in case of sheriffs' deeds and other proceedings *in invitum*. In the former, parol evidence is allowed to explain and identify and locate.—Id.

9. *Land and land titles—Equity—Bill of Peace.*—Where the correctness of a particular boundary line between two tracts of land has been thoroughly and satisfactorily tried in a number of actions, extending through a considerable time, and the verdict and judgment have always been in favor of the correctness of such boundary; equitable relief will be properly granted at the instance of the persons maintaining the correctness of said boundary, by enjoining its assailants from further vexing and harassing those asserting it by a suit at law; and this, even if the said actions so tried did not involve the same pieces of ground; provided they involved the same boundary and were between the same parties or their privies in estate.—Primm, et al. v. Raboteau, 407.

10. *Res adjudicata—Practice, civil—Parties—Tenants in common—Privity.*—A judgment in favor of defendants in a cause, determining their right to property in dispute, is binding upon all who are tenants in common or claim under the same title with the plaintiff, when the title of all such tenants in common hangs upon the same thread, and depends upon the same facts, although all have not been parties to the suit.—Id.

LAND AND LAND TITLES, continued.

11. *Land and land titles—Boundaries—Words of description.*—The words "the middle of the natural channel of the creek, when the pond is exhausted," mean the position of the thread of the creek when the pond was actually exhausted. (Primm vs. Walker, 38 Mo., 94; Mincke vs. Skinner, 44 Mo., 92, affirmed.)—Primm, et al. v. Raboteau, 407.

12. *Land and land titles—Boundaries—Equity.—Semble,* that equity will interfere to ascertain and fix boundaries where the rights of a large number of persons are affected and a confusion of boundaries has been occasioned by a lapse of time, accident or mistake, and a necessity therefore arises to adjust such conflicting claims and thus prevent interminable litigation.—Id.

13. *Party walls—Adjoining proprietors—Rights of—Tearing down—Re-building.*—The owner of each building supported by a common wall is entitled to have it supported by such wall so long as it is in a condition to uphold it, but when it becomes ruinous or dangerous, so that it endangers the safety of the property or life of the occupants, neither party is obliged to wait till the building falls down, but may proceed to rebuild; and the adjacent proprietor who refuses or neglects to join in the expense has no right of action for the damage or inconvenience which is occasioned by such repairs or rebuilding of the wall. This does not justify carelessness or negligence in doing the work.—Crawshaw v. Sumner, 517.

See Administration, 7, 8; Conveyance, 1; Equity, 1; Estoppel, 2, 4; Infants, 1, 2.

LANDLORD AND TENANT.

1. *Landlord and tenant—Lessee holding over—Notice to quit, when not necessary.*—A lessee for a year, holding over, but disclaiming his landlord's title, is not entitled to notice to quit.—Stephens v. Brown, 23.

2. *Landlord and tenant—Forcible entry and detainer—Sale of premises—Attornment.*—Under the statutes of this State, in suit by the landlord against his tenant for forcible entry and detainer, defendant may show that plaintiff has parted with his title, as by sale under a deed of trust, provided that the tenant has attorned to the purchaser. (See Pentz vs. Kuester, 41 Mo., 447.)—Kingman, et al., v. Abington, et al., 46.

3. *Possession of landlord after tenant's departure need not be personal.*—When a tenant leaves either at the end of the term or by surrender of the lease, the landlord comes into the sole possession of the premises, although not personally present.—Id.

4. *Lease—Release from "further" liability—The meaning of word "further."*—A release by a lessor of his lessee from "further" liability under his lease is not a release from liability for taxes already accrued and which by the terms of the lease, the lessee had assumed to pay. The word "further" as there used means "future."—O'Fallon v. Nicholson, 238.

5. *Landlord—Title not disputed by tenant.*—One holding under a lease cannot dispute the title of his lessor by showing him to be trustee of one having adverse or paramount title; and the same rule applies to the assignee of the lessee.—Stagg v. Eureka T. & C. Com., 317.

6. *Landlord and tenant—Crops—Pledge of as security for rent—Rights of landlord—Replevin.*—An agreement of lease of a farm contained a provision that in order to secure the rent reserved, the lessee conveyed and sold to the landlord all of a certain crop then growing on the land, with the power, in case of non-payment of the rent when due, to take possession of the crop and apply the proceeds *pro tanto* to the payment of his rent. *Held,* that the landlord had no right to the immediate possession of the crop; his right to possession depended upon the lessee's failure to pay rent, therefore before that contingency occurred the landlord had no right to replevy the crops.—Sheble v. Curdt, 437.

7. *Landlord and tenant—Rent—Crops—Lien—Attachment—Injunction.*—Under the statute which provides that every landlord shall have a lien upon the crop grown on the demised premises in any year, for the rent that shall accrue for

LANDLORD AND TENANT, continued.

such year, (1 Wagn. Stat., 880, § 18,) an attachment as provided for in the 26th section of the same act, (Wagn. Stat., 881-2;) is not necessary to enforce the lien. The court would enforce the lien without such process and would enjoin the removal or disposition of the crops while the lien continued. An attachment is proper only where there is no lien.—Price v. Roetzell, Adm'x, 500.

See Mechanics' Lien, 1; Trusts and Trustees, 2.

LARCENY, see Practice, criminal, 1.

LEASE, see Landlord and Tenant, 4.

LEVY, see Execution, 3.

LIMITATION.

1. *Ejectment—Statute of Limitations—Possession for period of—Patent need not be proved when.*—Possession of land in the owner or his grantors for more than thirty years, accompanied with a claim of right, establishes a title which will warrant a recovery in ejectment, unless defeated by a better title set up by defendant. It is unnecessary in such case to go further and show title from the United States, where the Government is no party to the suit.—Davis v. Thompson, 39.

2. *Limitations, statute of—Adverse possession—Action of ejectment by possessor—Title of Government, presumption as to.*—Ten years adverse possession, except as against the Government and parties laboring under disabilities, is not only a bar under the statute of limitations, but creates in the possessor an affirmative title under which he may maintain ejectment. And such possession will raise a presumption that the title has emanated from the Government and vested in the holder.—Barry v. Otto, 177.

3. *Limitations, statute of—Trusts, express—Denial of trust.*—In express technical trusts, the statute of limitations does not begin to run until the trust is denied by the trustee; (Smith vs. Ricords, 52 Mo., 581, affirmed) but the *cestui que trust*, in case of such denial, is limited to the period allowed for the recovery of legal estates at law.—Ricords, admx. v. Watkins, 553.

4. *Limitations, statute of—Implied Trusts—Right of action.*—In implied trusts the statute of limitations begins to run as soon as the facts are brought to the knowledge of the *cestui que trust*, so that he can take steps to enforce the trust. (Smith v. Ricords, 52 Mo. 581, affirmed.)—*Id.*

5. *Limitations, statute of—Trusts, implied—Express.*—It is not impossible that an express continuing trust, against which the statute of limitations would not run, could be shown by evidence independent of the writing conveying the property to which the trust is attached; and that it thus might be shown by independent testimony, that the possession or conduct of the trustee was consistent with, and not adverse to, the claim or right set up by the *cestui que trust*.—Per Vories and Napton, J. J., Dissenting.—*Id.*

M.

MACON COUNTY.

1. *Macon County—Charter—Tax levied by—How much per annum.*—In mandamus to compel the County Court of Macon county to levy a tax to meet the indebtedness of the county on railroad bonds issued for the Missouri & Mississippi Railroad Company, *held*, that under § 15 of the charter of the company (Sess. Acts 1863, p. 86,) said County Court had no power to levy in one year a tax of more than one-twentieth of one per cent. upon the assessed value of the taxable property in the county. County Courts have only such powers as are granted by statute; they can have no implied right to levy taxes.—State v. Shortridge, et al., 126.

MALICE, see Attachment, 2.

MARRIAGE.

1. *Marriage—Infants—Liability of magistrate—Defense.*—An honest mistake by a magistrate performing a marriage ceremony as to the age of a person whom he married, is no protection against the penalty affixed by law to the performance of such ceremony when the persons married are minors, without the consent of their parents or guardians.—Beckham v. Nacke, 546.

See Husband and Wife.

MARRIED WOMEN, see Husband and Wife.

MECHANIC'S LIEN.

1. *Mechanic's lien—Lease-hold estate—Delivery of lease—What facts estop denial of.*—Where the owner of land stated to a house-builder that he had leased certain premises to a third party, and the builder thereafter erected a hotel on said ground, with the knowledge of the owner, and without objection on his part; but on the contrary it appeared that the owner furnished said lessee with money to aid in erecting the hotel, and the lease was manifestly given with a view to such improvement; these facts, whether the lease was delivered or not, would estop the lessor from denying the delivery. And *semble*, that the fact that the owner some months after the commencement of the building, and when the lessee's responsibility became questionable, took from him a written surrender of the lease, would also estop him from asserting its non-delivery.—Allen v. Sales, et al., 28..

2. *Mechanics' liens—Judgment on—Proceedings anterior to, cannot be inquired into collaterally.*—A judgment in a mechanic's lien suit raises the presumption, which cannot be collaterally refuted, that the suit was commenced within ninety days after the filing of the lien; and that the lien was filed in time; and such judgment can be attacked in a collateral proceeding only by showing a want of jurisdiction in the court where the judgment was rendered.—Id.

3. *Mechanic's lien—Judgment relates back—Stat., Constr. of.*—Under the statute (Wagn. Stat., 907, § 7,) when a mechanic's lien is consummated by a judgment, that judgment relates back to the commencement of the building, and an intermediate transfer or surrender of the title cannot destroy or affect the lien of the holder.—Id.

4. *Mechanic's lien—Attaches, when—Effect of filing demand.*—The right of a mechanic or material man against property subject to a mechanic's lien commences at the time the building is commenced, and the labor or materials are furnished; and for all beneficial purposes the lien commences from that date, and while the claimant cannot enforce his lien against the property until he has complied with the provisions of the statute, still his right to the lien exists from the time that his work and materials go into the building. When the account is filed, the lien relates back to the commencement of the building, and cannot be cut off or divested by any transfer or assignment of the owner after the building is commenced.—Douglas v. St. L. Zinc Co. et al., 388.

5. *Mechanics' liens—Bankrupt act of the United States.*—It was not intended by the United States Bankrupt Law to cut off or destroy liens or vested rights acquired under State laws, but rather to preserve all liens and enforce a distribution of the property of the bankrupt with reference to the rights of all, whether those rights were created by a statutory lien or otherwise. And a person entitled to a mechanic's lien under the law of this state has a right notwithstanding the commencement of proceedings in bankruptcy to perform all acts necessary to the final prosecution and perfection of his lien under the statutes of this State.—Id.

6. *Mechanics' Lien—Bankruptcy—Jurisdiction.*—When the property of a bankrupt under the United States Bankrupt Law is subject to a mechanics' lien, the bankrupt court may order the assignee to sell the property and pay off the lien out of the proceeds, or may order the property to be sold subject to the lien, and in that case the courts of the State whose statute gives the lien, would have jurisdiction to ascertain and enforce the lien against the property notwithstanding the proceedings in bankruptcy.—Id.

MECHANIC'S LIEN, continued.

7. *Mechanics' lien—Bond against liens—Liens filed by surety on bond—Estoppel Counter-claim—Injunction.*—A. advanced money to B. to enable B. to improve certain land, taking a deed of trust on the land, and a bond from C., the contractor, with D. as surety, that the buildings to be erected would be delivered to B. free from mechanics' liens. E. afterwards purchased the property and took an assignment of the bond. D. subsequently filed a lien for materials delivered to C. for the builders. *Held*, that D. was not estopped by the bond from filing his lien; that if A. lost any part of his money by reason of such lien being filed, the damage so sustained might be set up as a counter-claim. *Semble*, that if D. was about to enforce a lien, which endangered A's. debt, A. might enjoin its collection till his debt was paid.—Hartman v. Berry, et al., 487.

MINES AND MINING.

1. *Injunction against mining by a trespasser who is insolvent.*—It has long been settled that where a mere trespasser digs into and works a mine to the injury of the owner, an injunction will be granted; and more particularly is this true when the trespasser is insolvent.—Lockwood v. Scott, 68.

2. *Mining—License—Trespass.*—One engaged in mining under an agreement with the owners, which by its terms was revocable at any time at their option, holds under a mere license, and by continuing work after its revocation becomes a trespasser. (See Lunsford vs. La Motte Lead Company, 54 Mo., 426.) —Lockwood v. Scott, 68.

MISTAKE, see Agency, 4.

MORTGAGES AND DEEDS OF TRUST.

1. *Married woman—Mortgage on separate property—Acknowledgment—Relinquishment of dower, etc.*—The certificate of acknowledgment of a married woman to a mortgage given by her on her separate property, is not void by reason of the fact that she is therein made to relinquish her dower. Such clause may be rejected as surplusage.—Siemers v. Kleeburg, 196.

2. *Feme covert—Mortgage of separate estate—Acknowledgment—Unnecessary when.* —*Semble*, that a *feme covert* signs a promissory note, her separate estate will be bound, although her deed of trust given upon such estate to secure the note was unacknowledged.—Id.

3. *Mortgage—Note secured by—Payment of—Subrogation—Remedy against estate of married woman, etc.*—Where a third person, at the instance of a mortgagor, or for his own protection, pays a note secured by the mortgage, he becomes entitled in equity to the benefit of the mortgage; and in such case, a court of equity will subrogate him to all the rights of the creditor. But where the owner of the property mortgaged is no party to the note, and is a stranger to the transaction by which the note was paid, and is a married woman not holding the land in her own separate right, the party so paying the note, can have no claim on the property.—Wolff v. Walter, 292.

4. *Bill in equity to set aside sale of land made during rebellion for non-payment of note.*—During the late rebellion, citizens residing in the rebel states were alien enemies and could not sue in courts of the loyal States, but they might be sued therein by citizens of the latter States. Thus, where, after the President's proclamation of August, 1861, a note having been dishonored, certain land given under deed of trust to secure it was sold to satisfy the debt, a bill in equity will not lie on behalf of the maker to set aside the sale, on the ground that the plaintiff was, when the note matured and the land was sold, within the Confederate lines and cut off from all intercourse with the loyal States: it further appearing, that the plaintiff had voluntarily gone and remained South. The doctrine of Dean vs. Nelson, (10 Wall., 158,) has no application to such a case.

Held further, that the trustee having absolute power to sell on default, it was immaterial what were the circumstances or disabilities of the maker of the note.

MORTGAGES AND DEEDS OF TRUST, continued.

Failure of notice to him, or even his previous death, would not invalidate the sale. The notice required by statute was not intended to apprise the grantor in the deed of the sale of the land.—DeJarnette v. DeGiverville, et al. 440.

5. *Note—Deed of trust—Sale under during war—Equity will interpose.*—During the late war, the citizens of the rebel States being alien enemies were subject to the laws of nations, under which one residing in the South would be prohibited from paying a note which fell due in the loyal States during that period. Hence, default in its payment under such circumstances would not authorize the sale of land given under deed of trust to secure it, and equity would interpose to set aside the sale.

The note and deed of trust must be construed as made subject to the implied power of the governments to which the parties belong, to interfere with or suspend it "*flagrante bello*." PER NAPTON, J., DISSENTING.—DeJarnette v. DeGiverville, et al., 440.

6. *Bills and Notes—Protest—Due diligence—Excuse for failure to protest.*—The question whether the maker of a promissory note had left his place of residence so that a demand of payment could not be made there; or whether he had a place of business in the city where he resided, where such demand could be made, are questions of fact for the jury.—Bartholow, et al. v. Barnard, et al., 550.

See Agency, 5, Bills and Notes, 2; Husband and Wife, 3.

N.

NEGLIGENCE.

1. *Negligence, immediate and proximate cause of injury—Recovery in case of negligence of plaintiff; of both parties.*—No one can recover for an injury of which his own negligence in part or in whole was the immediate and proximate cause. Where the negligence of both parties was the proximate cause, neither can recover.—Schaabs v. Woodburn Sarven Wheel Co., 173.

2. *Negligence—Question for jury, when.*—In many cases where the facts are undisputed, the question of negligence is one of law to be passed upon by the court, but, where they are disputed or admit of different constructions or inferences, the question should be left for the jury.—Norton v. Ittner, *et al.* 351.

See Damages; Railroads, 2.

NEW TRIAL, see Practice, civil, New Trial.

NOTARY PUBLIC, see Husband and Wife, 6.

NOTICE.

1. *Landlord and Tenant—Lessee holding over—Notice to quit, when not necessary.*—A lessee for a year, holding over, but disclaiming his landlord's title, is not entitled to notice to quit.—Stephens v. Brown, 23.

See Bills and Notes, 7; Guaranty, 2; Insurance, Fire, 1, 3; Streets, 1.

O.

OFFICERS.

1. *County Clerk—Resignation of office—Filing of with County Court—Effect—Forwarding of paper to Governor—Action by, etc.*—The Clerk of a County Court tendered his resignation to take effect at a future date. The paper was filed in the office of the court. Afterward and before the date when the resignation was to take effect, the clerk forwarded to the County Court his written withdrawal. But meantime and without his consent and against his express directions, the resignation had been forwarded to the Governor and by him approved, and another person appointed clerk.

Held, that under a proper construction of the State Constitution (Art. V, § 8), such resignation was not legal and complete unless sent to the Governor and

OFFICERS, continued.

accepted by him with the knowledge and consent of the clerk; that the filing of the document with the County Court was a nullity, giving that body no jurisdiction; that the paper was constructively still in possession of the clerk; that in law the office of County Clerk did not become vacant; and that with the sanction of the court, the clerk might at the same term legally withdraw his resignation notwithstanding the new appointment of the Governor. —State v. Van Buskirk, 17.

2. *St. Louis, City of—Land Commissioner—Assessments must not exceed benefits.* —Section 3, Art. VIII, of the Act of 1870, revising the Charter of the City of St. Louis (Sess. Acts, 1870, p. 478), provides that the Land Commissioner's jury shall assess property of owners, adjoining land condemned for street openings, "in proportion that such property may be respectively benefited by the proposed improvement." Under that section, an instruction to the jury that they are bound to find a verdict for the amount of damages although they may be of the opinion that the sums to be assessed against adjoining land-owners therefor, may be in excess of the actual benefits derived by the property, is manifest error. Under such instruction, private property may be taken without just compensation in the way of benefits.—Tyler v. St. Louis, 60.

3. *Elections—Official returns—Governor and Secretary of State cannot go behind.* —In counting votes for a Circuit Judge, neither the Governor nor the Secretary of State have any authority to go behind the returns officially certified to the Secretary.—State v. Townsley, 107.

See Elections, 2; Engineer; Execution, 2; Judgment, 1; Revenue, 1.

ORDINANCE, see St. Louis, City of, 3, 6.

OWNER, see Damages, 3.

P.

PARTNERSHIP.

1. *Partners—Rights of—Appropriation of partnership property to payment of separate debt of one partner.*—While there is no doubt about the power of one partner to dispose of the property of the firm by *bona fide* sales, yet he cannot appropriate it, without the consent of his co-partner, to the payment of his individual debts, either with or without the knowledge of the creditor that such property belonged to the partnership.—Ackley, et al. v. Staehlin, 558.

2. *Partnership—Contracts—Evidence.*—A firm composed of A. and others, under the firm name of A. & Co., had been doing business in another city, and had had transactions with C. doing business in St. Louis. The firm of A. & Co. was dissolved and A. formed a new partnership with B. under the name of A. & B., and succeeded to the business of the old firm. Subsequent to this change, C. sent an order for goods addressed to A. & Co., which was filled by A. & B. and a letter was written to C. by a clerk who had been in the employment of A. & Co., and continued in the employ of A. and B., advising him of the shipment of the goods; this letter was written in the name of A. & Co., and the goods were marked with their initials, and A. & Co. were credited by C. with the value of the goods. Other letters were also written by the same clerk under the name of A. & Co. to other parties, after said dissolution, concerning their business in St. Louis. After the purchase of these goods C. was garnished on an attachment against A. & Co., and paid over their value under the garnishment. On a suit by A. & B. against C. for the price of the goods, *Held*, that it was a question of fact for the jury whether B. had knowledge, at the time, of the manner in which the goods had been shipped, and that if he had such knowledge, he was bound by the letter of the clerk written to C., and that said letter was admissible in evidence; and also, that the other letters were admissible to show that the firm of A. & Co., was still in existence as to parties in St. Louis or assumed to be so with the knowledge of B.—Ackley et al. v. Winkelmeyer, 562.

PARTY WALLS, see Land and Land Titles, 13.

PATENT, see Ejectment, 1; Land and Land Titles, 5.

PAYMENT, see Revenue, 1.

POSSESSION, see Bills and Notes, 1, 2; Fraudulent Conveyances, 1, 2; Land and Land Titles, 7; Landlord and Tenant, 3; Limitations, 1.

PRACTICE, CIVIL.

1. *Practice, civil—Correction of entries, nunc pro tunc.*—Courts have a right at a term subsequent to the one at which a judgment is rendered to correct, by an order *nunc pro tunc*, a clerical error or omission in the original entry, and it will be presumed in the absence of contrary evidence that the court exercised proper judgment in making such corrections.—Allen v. Sales, et al., 28.
2. *Practice, civil—Circuit Court—Appeal set aside—New trial, etc.*—The Circuit Court has the right at the same term at which an appeal is allowed to set aside the order granting the appeal, and then grant a new trial.—Kingman et al. v. Abington, et al., 46.
3. *Practice, civil—Continuance—Granting of, left to discretion of court, etc.*—The continuance of a cause rests very much in the sound discretion of the court, and the exercise of such discretion will be presumed to be sound and proper. Unless it plainly appears from the record that the discretion has been unsoundly or oppressively exercised, the Supreme Court ought not to interfere.—Bartholow, et al. v. Campbell, 117.
4. *Practice, civil—Continuance, affidavit for—What essential to.*—An affidavit of continuance ought to negative any inference that it is made for vexation or delay, and where the application is grounded on the absence of a witness, it should state at what time deponent expects to be able to procure his testimony.—Barker v. Patchin, 241.
5. *Equity—Practice, civil—Motion—Relief.*—Where a motion is made under a statute for a particular remedy therein provided, it is not competent for the court, on that motion, to grant other equitable relief which is not embraced in or relied on in the motion.—Schneider v. Meyer, et al., 475.
6. *Practice, civil—Papers in duplicate—Notice to produce, etc.*—Notice to produce is never required where the instrument to be proved and that produced are duplicate originals, or where the instrument to be proved is itself a notice.—Barr, et al v. Armstrong, 577.
7. *Practice, civil—Instructions.*—Instructions not based on evidence ought not to be given.—Id.
8. *Practice, civil—Instruction—May assume facts, when.—Semble,* that when testimony is clear and undisputed, an instruction may assume the truth of the matter sworn to.—Id.

See Practice, civil, Actions; Eminent Domain; Judgments, 6; Mechanic's Lien, 4.

PRACTICE, CIVIL, APPEAL, see Appeal; Court, St. Louis Circuit, 1.

PRACTICE CIVIL—NEW TRIAL.

1. *Practice, civil—Circuit Court—Appeal set aside—New trial, etc.*—The Circuit Court has the right at the same term at which an appeal is allowed, to set aside the order granting the appeal, and then grant a new trial.—Kingman, et al. v. Abington, et al., 46.
2. *Practice, civil—New trial—Motion for before judge succeeding the one trying cause, etc.*—The action of a judge in overruling a motion for a new trial, etc., on the ground that the case having been heard before his predecessor he was ignorant of the merits, is error. In such state of facts he should have granted a new trial. (Woolfolk vs. Tate, 25 Mo., 597.) Generally, in a case of this character costs should be taxed against the party filing the motion.—Cocker v. Cocker, 180.
3. *New trial—Motion for—Not necessary, when.*—Generally, a motion for a new trial is necessary in order to bring the matter complained of to the attention of the trial court and save matters of exception which occurred in the progress

PRACTICE, CIVIL—NEW TRIAL, continued.

of the trial. But when the whole case is decided upon demurrer to the petition, and judgment is rendered thereon, or where the case is dismissed upon motion, and the motion and exceptions are preserved of record by a bill of exceptions, so that the errors of the court appear upon the record, it is not necessary or usual to file a motion for a new trial.—O'Connor v. Koch, 253.

4. *Practice, civil—New trials—Newly discovered evidence—Diligence.*—It is a rule of almost universal application that a new trial will not be granted on the ground of newly discovered evidence, where the new facts are to be proved by a witness who has already testified in the cause, and a new trial should not be granted on such ground, if it appears that the failure to discover it is the result of lack of due diligence.—Cook v. St. L. & K. R. Co., 380.

5. *Practice, civil—New trials—Granting of, matter of discretion with the trial-court.*—The granting of new trials, because of newly discovered evidence, rests for the most part with the trial-court; and any doubt as to whether its discretion has been soundly exercised is to be resolved in favor of its ruling.—Id.

See Execution, 1.

PRACTICE, CIVIL—PARTIES.

1. *Administration—Practice, civil—Parties—Action on administrator's bond—Distributees may sue jointly, before order of distribution.*—Before an order of distribution is made, those entitled to distribution have a common interest in the fund, and in an action against the sureties on the administrator's bond they may properly be joined as plaintiffs to prevent a multiplicity of suits.—Kelly v. Thornton, et al., 325.

See Administration, 5.

PRACTICE, CIVIL—PLEADING.

1. *Practice, civil—Pleading—Allegations taken as true, when, etc., and as to whom.*—Under the Practice Act (Wagn. Stat., p. 1019, § 36) facts not controverted in a previous pleading are to be taken as true in favor of the party pleading them, not as a matter to be submitted to and found by the jury; but they are taken as true as a matter of law to be declared by the court. But the failure of plaintiff to reply to a defense set up in the separate answer of one defendant is no admission of such defense as to the other defendants not setting it up.—Bartholow v. Campbell, 117.

2. *Husband and wife—Wife may answer separately, when.*—Under the statute (Wagn. Stat, 1001, § 8) a married woman may answer separately although her husband is co-defendant.—Scimers v. Kleeburg, 196.

3. *Practice, civil—Pleading—Distinctness and brevity in—Motion to amend pleading for uncertainty—Motion stricken out on same ground.*—A motion to amend a petition on the general allegation that the pleadings are irrelevant or redundant is not sufficient. The motion should, with at least a reasonable degree of certainty, set forth the particulars wherein the pleadings are uncertain. Good practice not only requires the petition to have certainty and brevity, but it also requires some certainty and distinctness to be observed by the defendant.—O Connor v. Koch, 253.

See Practice, civil, New Trial, 2.

PRACTICE, CIVIL—TRIALS.

1. *Practice, civil—Verdict—General finding for defendant sufficient, unless in case of counter-claims.*—It is not necessary to find separately for defendant on each count. A general finding for defendant embraces all the issues and is in effect the same as finding each issue for him. This rule may not apply where the answer contains distinct and separate counter-claims.—Schaabs v. Woodburn Sarven Wheel Co., 173.

2. *New trial—Motion for—Not necessary when.*—Generally a motion for a new trial is necessary in order to bring the matter complained of to the attention of the trial court and save matters of exception which occurred in the progress of the trial. Bnt when the whole case is decided upon demurrer to the petition, and judgment is rendered thereon, or where the case is dismissed upon motion, and the motion and exception are preserved of record by a bill of exceptions, so that the errors of the court appear upon the record, it is not necessary or usual to file a motion for a new trail.—O'Connor v. Koch, 253.

PRACTICE, CIVIL—TRIALS, continued.

3. *Practice, civil—Jury—Verdict—Supreme Court.*—In civil law cases the Supreme Court will not disturb the verdict of the jury on questions of conflicting testimony.—Estel, et al. v. St. L. & S. E. R. R. Co., 282.

4. *Practice, civil—Instructions, should cover the whole case.*—Instructions should be founded upon all the evidence and take in the whole case; but a judgment will not be reversed because one is technically erroneous, provided the instructions given, taken together, fairly present the law on both sides of the case and in a manner not likely to mislead.—Henschen v. O'Bannon, 289.

5. *Practice, civil—Instructions.*—The giving of inconsistent instructions is error.—Id.

6. *Instructions should present the whole case.*—If an instruction does not cover the whole case, the court may modify it so as to present the views of both parties under the pleadings and the evidence.—O'Neil, et al. v. Capelle, 296.

7. *Practice, civil—Trials—Re-opening of case after it has been submitted—Surprise.*—It is not error to refuse to open a case on the application of a party, after it has been submitted on the evidence. The granting of such an application would be a surprise to the other party.—Van Studdiford, Trustee, v. Hazlett, 322.

8. *Practice, civil—Jury—Evidence.*—In civil law cases, the jury must determine the weight of evidence.—Burham v. St. L. & I. M. R. R. 338.

9. *Wills—Contest, touching—Right to open and close.*—In a statutory proceeding to contest a will (Wagn. Stat. 1368, § 29) the *onus probandi* is upon the defendant, and he is therefore entitled to open and close. But the right to open and close generally rests very much in the sound discretion of the court; and an error upon this point will not warrant a reversal, unless defendant is shown to have suffered injury in consequence.—Harvey, et al. v. Heirs of Sullens, 372.

10. *Practice, civil—Trials—References—Exceptions to report.*—Unless exceptions to a referee's report are allowed, the report should be confirmed and judgment rendered thereon in the same manner and with like effect as upon a special verdict. The case should not be set down for a re-trial by the court.—Reinbecke v. Michael, 386.

11. *Practice, civil—Trials—Testimony—Objections to—Grounds must be specifically stated, in legal or equitable actions.*—The rule requiring the grounds of objections to testimony to be specifically stated, applies alike to legal and equitable actions; and objections, the grounds of which are not specifically stated, are properly disregarded by the court.—Primm, et al. v. Raboteau, 407.

12. *Practice, civil—Trials—Instructions—Multiplicity of—Ground of refusal.*—Too great a multiplicity of instructions would only tend to confuse a jury, and of itself would be a good ground for their refusal.—Crawshaw v. Sumner, 517.

13. *Practice, civil—Trials—Instructions stating abstract principles not adapted to the facts, improper.*—Instructions should always be framed with reference to the issues and evidence in the cause. It is not error in a court to refuse to give an instruction containing an abstract principle of law, if, from the facts of the case, the instruction is not applicable or would tend to mislead the jury.—Longuemare v. Busby, 540.

14. *Practice, civil—Trials—Instructions should apply to theories of both sides—Fraud—Should not be ignored by instructions.*—An instruction which ignores facts which would make a contract fraudulent or ignores the theory of either side based upon such facts is erroneous.—*Id.*

15. *Practice, civil—Trials—Evidence—Instructions.*—Where testimony is presented on both sides tending in any degree to establish the respective theories of plaintiff and defendant, it is error to take the case from the jury by instruction.—St. Vrain v. C. B. Levee Co. 590.

16. *Practice, civil—Continuance—Granting of, left to discretion of court, etc.*—The continuance of a cause rests very much in the sound discretion of the court, and the exercise of such discretion will be presumed to be sound and proper. Unless it plainly appears from the record that the discretion has been unsoundly or oppressively exercised, the Supreme Court ought not to interfere.—Bartholow, et al. v. Campbell, 117.

See Evidence, 2; Practice, criminal, 2; Referee.

PRACTICE, CRIMINAL.

1. *Practice, criminal—Indictment for burglary in first degree—Conviction of, in second degree and of larceny.*—Where the language of an indictment and the facts proved constituted a case of burglary in the first degree, (Wagn. Stat., 454,) a verdict convicting defendant of burglary in the second degree is error, and will be set aside on appeal to the supreme court.

But in such case defendant may be found guilty of larceny.—State v. Alexander, 131.

2. *Practice, criminal—Appeal—Death of defendant—Effect of.*—Where pending appeal taken upon a conviction for misdemeanor defendant dies, the suit cannot be revived against his administrator, but must abate and the appeal will be dismissed. (Wagn. Stat., p. 1114, § 12.)—State v. Perrine, Adm'r, 602.

See Criminal Law, 1.

PRACTICE—SUPREME COURT.

1. *Practice, Supreme Court—Bill of exceptions—Record.*—Nothing is brought to the Supreme Court without a bill of exceptions, except the record proper.—State v. Miller, 125.

2. *Practice, Supreme Court—Leading question—Decision of trial court, no ground for reversal.*—The question whether a leading question is permissible in direct examination is one to be decided by the trial court in its sound discretion, and its decision in this regard is not assignable for error in the Supreme Court.—St. L. & I. M. R. R. v. Silvers, 265.

3. *Practice, civil—Jury—Verdict—Supreme Court.*—In civil law cases the Supreme Court will not disturb the verdict of the jury on questions of conflicting testimony.—Estel, et al. v. St. L. & S. E. R. R. Co., 282.

4. *Supreme Court—What points examined by.*—The Supreme Court will only pass upon such points as were presented in the court below.—Wolff v. Walter, 292.

5. *Practice, civil—Conflict of evidence.*—In civil law cases, questions of conflicting evidence will not be reviewed by the Supreme Court.—St. Louis to use of Bruennell v. Bressler, 350.

6. *Practice, Supreme Court—Evidence, not weighed*—The Supreme Court will not weigh evidence in a cause to see if it was properly considered by the jury; although, if it were clearly shown that there was absolutely no evidence to uphold a verdict so as to plainly indicate that the verdict was the result of mistake, prejudice or corruption, the Supreme Court would not hesitate to reverse the judgment rendered on such a verdict. To induce such action the case must be a clear one.—Doering v. Saum, et al., 479.

7. *Practice, Supreme Court—Evidence will not be weighed in the Supreme Court.*—Where there is evidence tending to prove both sides of the case, it will not be weighed by the Supreme Court.—Longuemare v. Busby, 540.

8. *Practice—Supreme Court—Verdict contrary to evidence.*—While the Supreme Court, in law cases, will not generally weigh evidence or disturb a verdict where there is conflicting testimony, yet where the verdict is manifestly against the evidence and instructions, the Supreme Court will interfere and reverse the judgment.—Ackley, et al. v. Staehlin, 558.

See Damages, 1; Practice, civil, trials, 3; Quo Warranto, 3; Referee, 3.

PRINCIPAL AND AGENT, see Agent.

PRINCIPAL AND SURETY, see Surety.

PRIVITY, see Land and Land Titles, 11.

PROBATE, see Administration.

PROTEST, see Bills and Notes, 11.

Q.

QUANTUM MERUIT, see Contracts, 5.

QUO WARRANTO.

1. *Quo warranto—Change of venue—Application for, to what court addressed, etc.*—Where in *quo warranto* the issues of fact are ordered by the Supreme Court to be tried in a specified county, application for change of venue made to the court of that county is properly overruled. Any objections to the venue should in such case be addressed to the Supreme Court.

The general law touching change of venue has no application to such a case.—State v. Townsley, 107.

2. *Quo waranto—Circuit Judge—Returns of election, correctness of—Issues touching.*—In *quo warranto* on the relation of the Attorney General to test the title of a Circuit judge to his office, defendant averred generally that he was duly elected. Plaintiff's replication set out specifically the returns from the counties comprising the circuit, and charged that the returns from a certain county had been excluded from the count. Defendant's rejoinder was a general denial of the averments of the replication—nothing more; *Held*, that the correctness of the returns was not put in issue by the pleadings, and could not be inquired into.

In *quo warranto*, parties cannot go behind the official returns, unless the specific objections thereto be stated in the pleadings; there must be, *e. g.*, a specification of the number and names of the voters alleged to be illegal; general averments in reference thereto are insufficient.—Id.

3. *Quo warranto—Supreme Court—Common law.*—In the State of Missouri, pleadings in *quo warranto*, in the absence of any statute, are governed by the common law.—Id.

4. *Quo warranto—Defendant's title to be tested under—Plaintiff's right determined incidentally, when.*—The primary and fundamental question, in a proceeding in *quo warranto*, is whether the defendant is legally entitled to hold the office, and not as to the rights of any other person who may claim it. Where the information is on the relation of one who himself claims to have been elected, his rights may incidentally have to be determined, but not where the proceeding is instituted by the State.—Id.

R.

RAILROADS.

1. *County railroad bonds—Andrew county—Interest on bonds, what lawful.*—In January, 1860, by the general law then in force, the county had power to issue bonds for the Platte County Railroad Company, bearing interest at the rate of ten per cent. These bonds were not governed by § 33 of the statute touching Railroads (R. C. 1855, p. 429), limiting the interest to seven per cent. That section referred to special cases contemplated by § 31 of same act. The bonds of Andrew County were issued under different circumstances and a distinct and independent grant of power ; and as no limitation was therein imposed as to the interest, it was competent to fix any rate of interest not prohibited by law.—Beattie v. Andrew County, 42.

2. *Railroads—Damages—Negligence, contributory.*—Although one injured by a railroad collision may have failed to exercise ordinary care and prudence, and thereby contributed remotely to the injury complained of, yet if the accident was directly caused by negligence of the company, the latter will be liable.—Burham v. St. L. & I. M. R. R., 338.

RATIFICATION, see Infants, 2.

REBELLION, see Bills and Notes, 9.

RECORD, see Practice, Sup. Ct., 1.

REFEREE.

1. *Reference in invitum—Jury—Constitution.*—In an action at law involving the examination of a long account, the court may properly refer the case on the motion of one and against the objection of the other party (See Wagn. Stat., 1041, § 18.)—This provision is not unconstitutional as depriving the objecting party of the right to trial by jury (Const. Art. I, § 17). Such power of reference had been authorized and exercised for twenty years prior to the present constitution. And the object of the framers of that instrument must have been to preserve the right of jury trial as it then existed and has been practiced upon, and not to establish a new rule on that subject.—Edwardson v. Garnhart, 81.

2. *Referee—Statutory oath—Report—Recital of touching.*—The recital in a referee's report that he had been "duly qualified" is at least *prima facie* evidence that he had been sworn as the statute required; particularly in a case where the parties had proceeded without objection to hear the whole case before the referee.—Id.

3. *Referee—Report—Objections to raised first in Supreme Court not heard.*—The objection that a referee failed to find separately on each count of the petition, when not made to the report or raised by a motion for a new trial will not be considered by this court.—Id.

4. *Practice, civil—Trials—References—Exceptions to report.*—Unless exceptions to a referee's report are allowed, the report should be confirmed and judgment rendered thereon in the same manner and with like effect as upon a special verdict. The case should not be set down for a re-trial by the court.—Reinbecke v. Michael, 386.

REPLEVIN.

1. *Replevin vs. Constable's Adm'r—Competency of plaintiff as witness—Constr. stat.—Surplus fund—Creditors.*—In replevin by a third party against a constable for goods seized under execution, where the constable died after suit was commenced and his administrator was substituted as a party, the plaintiff then ceased to be a competent witness under the statute.-(Wagn. Stat. 1371-2, § 1.)

In such proceeding, judgment being given in behalf of defendant for the value of the property, any surplus after satisfying the execution debt, may be seized by the other creditors. Plaintiff in the replevin cannot hold it.—Blobaum v. Gambs, Adm'r, 183.

See Landlord and Tenant, 6.

RES ADJUDICATA.

1. *Res adjudicata—Practice, civil—Tenants in common—Privity.*—Under the above detailed circumstances, the personal participation of a party in the previous litigation is wholly immaterial, provided his title hangs by the same thread, and depends on the same facts, as that of his co-claimants.—Primm v. Raboteau, 407.

RESIGNATION, see Officers, 1.

REVENUE.

1. *Collector—Check received for taxes, when amounts to payment.*—Where a tax-payer has funds in bank sufficient to pay his taxes and the collector receives his check for the amount, and fails to present the check in due time at the bank and the institution afterwards fails, the collector must bear the loss. And if after receipt of the check, the collector returns the taxes delinquent, and the tax-payer is compelled to pay them with another appropriation of money, the collector becomes liable to him for the amount of the check.—Chouteau v. Rowse, 65.

2. *Special tax-bills—Personal and general judgment on.*—In a suit on a special tax-bill, the rendition of a personal or general judgment against defendant is error.—Strassheim v. Jerman, 105.

REVENUE, continued.

3. *Insurance, life—Capital Stock—Taxation, what property subject to.*—Section 40 of the act touching life insurance, (Wagn. Stat. 752) provides that the payment of certain fees by the respective companies, shall be "in lieu of all fees and taxes whatever, except that they may be taxed upon their paid up capital stock the same as other property in the county, for county and municipal purposes." *Held,* that this provision, properly construed, did not prevent the taxation of other property owned by the companies, over and above the par value of their capital stock. Such is not double taxation. But the non-taxation of such property would amount to an exemption, in violation of the State Constitution. (See Life Association of America v. Board of Assessors, etc., 49 Mo., 512.)—St. L. M. L. Ins. Co. v. Bd. of Ass. of St. L. County, et al., 503.

4. *Revenue—Double taxation not necessarily void.*—In levying taxes on property, the same value is sometimes unavoidably taxed twice; but this fact does not, of itself, render the tax illegal and void.—St. L. M. L. Ins. Co. v. Bd. of Ass. of St. L. County, *et al.*, 503.

See Special Taxes.

S.

SAINT LOUIS, CITY OF.

1. *St. Louis, City of—Land Commissioners—Assessments must not exceed benefits.*—Section 3, Art. VIII, of the Act of 1870, revising the Charter of the City of St. Louis (Sess. Acts, 1870, p. 478), provides that the Land commissioner's jury shall assess owners, of property adjoining land condemned for street openings, in proportion that such property may be respectively benefited by the proposed improvement." Under that section, an instruction to the jury that they are bound to find a verdict for the amount of damages, although they may be of the opinion that the sums to be assessed against adjoining land owners therefor, may be in excess of the actual benefits derived by the property is manifest error. Under such instruction, private property may be taken without just compensation in the way of benefits.—Tyler v. St. Louis, 60.

2. *St. Louis—Street improvements—Unexecuted contracts for—Ordinance validating—Acceptance of, etc., etc.*—Under § 9 of the Act of March, 1867, amendatory of the charter of St. Louis, (Sess. Acts 1867, p. 73,) it was competent for the city, where a contract entered into under a certain ordinance remained unexecuted, to adopt and approve such contract by an amendatory ordinance on condition that the contractors would file their written acceptance of the latter ordinance. Such adoption and approval were within the meaning of the above section of the charter a "providing by ordinance" for the performance of the work which had been contracted for.—Strassheim v. Jerman, 105.

3. *Street Improvements—Ordinance touching—Completion of—Specification as to time of.*—An ordinance authorizing a City Engineer to make certain street improvements is not invalidated by reason of its failure to specify the time within which the work shall be done.—Id.

4. *St. Louis—Sewer—Route of in district—Need not be determined by ordinance.*—Under § 12, Art. VIII. of the charter of the City of St. Louis, of 1870, the City Council must establish the sewer districts by ordinance. But it need not pass another and special ordinance to determine the particular route, or dimensions or material or laterals of the sewer within the district. These details may be determined by ordinance, or be entrusted to the engineer to be regulated by contract.—State, ex rel., v. St. Louis, 277.

5. *St. Louis—Sewer—Plans and profiles—To be submitted to the City Council, when.*—The plans, profiles and estimates mentioned in § 17, Art. VIII of the St. Louis charter of 1870, are required to be prepared and submitted to the City Council, only in cases where the work is done by the city, and paid for by appropriations out of the city treasury.—Id.

SAINT LOUIS, CITY OF, continued.

6. *Street improvement—Ordinance in relation to—Specification as to time when work is to be done.*—An ordinance authorizing the city engineer of the city of St. Louis to improve certain streets is not rendered invalid by reason of its failure to specify the time within which the work shall be done.—Carlin v. Cavender, 286.

See Corporations, 1.

SALES, see Frauds, statute of, 2; Sheriff's Sales.

SATISFACTION, see Judgment, 8.

SCHOOLS AND SCHOOL LANDS.

1. *Township organization—Webster Groves School District—Power to extend limits of—Constr. Stat.*—The town of Webster Groves having been laid out and a plat thereof having been filed in the proper recorder's office (§ 1, Act March 17th, 1868; Adj. Sess. Acts, 1868, p. 164), under § 1 of the Act of March 23rd, 1868, *Id.*, p. 164, the Webster Groves district had power to change and extend its limits, although the town was not incorporated. Notwithstanding the use of the word "corporation" in the last mentioned statute, the design of the legislature was not to confine the operation of its provisions to towns, etc., which had been incorporated.—State, ex rel., v. Heath, 231.

SEPARATE ESTATE, see Husband and Wife, 1, 2, 5, 10; Trusts and Trustee, 2.

SETTLEMENT, see Account Stated.

SEWERS, see Corporations, 1; St. Louis, City of, 4, 5.

SHERIFF, see Execution, 3.

SHERIFF'S SALE.

1. *Sheriff's deed—Different judgments—One deed under—Consolidation of descriptions.*—A sheriff upon the sale of a certain parcel of land, against the owner of which three judgments and executions were outstanding, made a deed which united in one description the different judgments and executions, and the gross amount recovered. But the dates of the judgments and executions were correctly stated, and the names of all the parties were correctly given in the aggregate. The deed was substantially correct, and the recitals although somewhat ambiguous could mislead no one. *Held*, that the deed sufficiently conformed to the statute.—Allen v. Sales, et al., 28.

2. *Administration—Real estate, sales of—Deeds, description in—Sheriff's sales.*—A sale of real estate by an administrator is *in invitum* as to the heirs, who are the real owners. He exercises a statutory power under the orders of the Probate Court, and the principles which apply to sheriffs' sales as to the description of the property to be sold, apply to administrators' sales.—Jones, et al. v. Carter, 403.

SPECIAL TAXES.

1. *Engineer—Special tax bill—Substitution of name on bill.*—A special tax bill in which the name of the property owner originally inserted by the city engineer is stricken out and another added by the assignee instead, is inadmissible in evidence; and this is the case even although in suit on the bill against the party whose name is substituted, he admits that he owns the property mentioned in the bill.—Kefferstein v. Knox, 187.

2. *Engineer—Special tax bill—Judgment in case of, should be special against property.*—In suit on a special tax bill for street improvements no general or personal judgment against the defendant can be rendered. The judgment should be a special one against the property.—Carlin v. Cavender, 286.

3. *Special tax bills—Judgment on, should be special.*—Judgments in suits upon special tax bills should be special—against the propery charged with the lien—and not a personal or general one.—St. Louis to use of Bruennell v. Bressler, 350.

See Revenue; Judgment, 3, 5.

STATUTE, CONSTRUCTION OF.

1. *Injunction—Ferry privilege—Conflicting charters of Missouri & Kansas Legislature.*—In bill to enjoin defendant from ferrying the Missouri River between this State and Kansas, within a certain territory to which plaintiff claimed the exclusive franchise, solely by virtue of the Act passed by this State, Nov. 17th, 1855, demurrer held well taken. *Non Constat*, but that under an Act passed by the Legislature of Kansas, defendant had a similar privilege of ferrying from the opposite shore.—Challiss v. Davis, 25.

See Administration, 2, (Wagn. Stat. 85, §§ 7, 8, 10); 9 (Wagn. Stat. 1368, § 29); Wagn. Stat. 72, § 13); 11 (Wagn. Stat. 72, § 13).
Attachment, 5, (Wagn. Stat. 189, § 42).
Bonds, Andrew County, 1, (R. C. 1855, 429, §§ 31, 33).
Corporations, 2, (Wagn Stat. 752, § 40).
Criminal Law, 1, (Wagn. Stat. 500, § 8).
Eminent Domain, 1, (Sess. Acts, 1849. p. 593).
Execution, 2, (Wagn. Stat. 1372–3, § 1).
Fraudulent Conveyances, 1, 2, (Wagn. Stat. 281, § 10).
Husband and Wife, 4, (Wagn. Stat. 1001, § 8); 6 (Adj. Sess. Acts, 1863–4, p. 27); 11 (Wagn. Stat. 1000, § 3).
Injunction, 1.
Insurance, Life. 1, (Wagn. Stat. 752, § 40); 2 (Wagn. Stat. 1000, § 3).
Landlord and Tenant, 7, (Wagn. Stat. 880, § 18; Id. 881–2, § 26).
Macon County, 1, (Sess. Acts 1863, 86, § 15).
Mechanic's Lien, 3, (Wagn. Stat. 907, § 7).
Officers, 2, (Sess. Acts, 1870, p. 478, § 3).
Practice, Civil, Pleadings, 1, (Wagn. Stat. 1019, § 36); 2 (Wagn. Stat. 1001, § 8).
Practice, Civil—Trials, 9 (Wagn. Stat. 1368, 29).
Practice, Criminal, 1, (Wagn. Stat., 454, § 10,) 2 (Wagn. Stat. 1114, § 12).
Railroads, 1, (R. C. 1855, 429, §§ 31, 33).
Referee, 1, (Wagn. Stat. 1041, § 18).
Replevin, 1, (Wagn. Stat. 1372–3, § 1).
Revenue, 3, (Wagn. Stat. 752, § 40).
St. Louis, City of, 1, (Sess. Acts, 1870, p. 476, § 3); 2 (Sess. Acts, 1867, p. 73, § 9); 4 (Sess. Acts, 1870, p. 480, § 12); 5 (Sess. Acts 1870, pp. 481–2, § 17).
School and School Lands, 1, (Adj. Sess. Acts, 1868, p. 164, § 1; [Act approved March 17]; *Id.* § 1.) [Act approved March 23].
Sureties, 3, (Wagn. Stat. 76, §§ 39, 41).
Trade-Marks, 1, (Sess. Acts 1870, p. 72).
Wills, 2, 4, (Wagn. Stat. 1368, § 29); 4 (Wagn. Stat. 72, § 13); 6 (Wagn. Stat. 72, §§ 6, 13).

STOCK, see Insurance, Life, 1.

STREETS.

1. *Damages—Street gutter out of repair—Injuries to team in crossing—Notice to authorities of state of street, etc.*—Where a street gutter was washed away and a mule team which was compelled to cross received damage in consequence, and the evidence showed that the street had been in that condition for two months *held*, that the city was liable, although not notified that the street was out of repair.—Market v. St. Louis, 189.

See St. Louis, City of, 1, 2, 3, 6; Officers, 2.

SURETIES.

1. *Administrator's bond—Sureties—Distributees may maintain action before final settlement.*—Where the administrator has failed to distribute funds in his hands according to law and has been removed, where there are no debts due by the estate persons entitled to distribution may bring suit on the administrator's bond without the appointment of an administrator *de bonis non* and before a final settlement.—Kelly v. Thornton, et al. 325.

SURETIES, continued.

2. *Justices' courts—Appeal—Sureties—Non-suit.*—Where defendant appealed from the judgment of a justice, and in the Circuit Court plaintiff took a voluntary non-suit, which was afterwards set aside without the knowledge or consent of the sureties on the appeal bond, and plaintiff had judgment against defendant and his sureties. *Held*, that the sureties were bound by the judgment.—Bailey v. Rosenthal, 385.

3. *Administration—Bond—Sureties—Additional—Release of former.*—The security contemplated by the 41st section of the Administration Law, is additional to that previously given, and does not have the effect of releasing the former sureties. The 39th section applies to an entirely different case, and does not apply to that contemplated by the 41st section. (State, *ex rel.*, Glenn vs. Wrights, Adm'r, 53 Mo., 479, affirmed.)—Haskell v. Farrar, et al., 497.—See Estoppel 5.

SURPRISE, see Practice, civil, Trial, 7.

T.

TAX, see Macoupin County; Special Taxes; Revenue.

TENANT IN COMMON, See Land and Land Titles, 11.

TITLES, see Land and Land Titles.

TOWNSHIP ORGANIZATION, see Schools and School Lands.

TRADE MARKS.

1. *Trade marks—Act of 1870—Meant to protect foreign as well as domestic trade marks.*—The act to protect merchants, etc., against counterfeit trade marks, approved February 22nd 1870, (Adj. Sess. Acts 1870,) was designed to protect foreign as well as domestic trade marks, and may be invoked by citizens of other States and countries.—State v. Gibbs, 133.

TRESPASS, See Mines and Mining, 2.

TRUSTS AND TRUSTEES.

1. *Garnishment—Trust property not subject to.*—The statute touching garnishment is essentially legal and not equitable in its nature and procedure; and the rights, credits and effects in the hands of the garnishee which are subject to attachment are such as are not encumbered with trusts, and such as may be delivered over, or paid to the officer under the direction of the court, free from the incumbrances of a trust.

Where a conveyance in trust is made in fraud of creditors, a different rule prevails, for the instrument being void, the property is subject to attachment under simple law process.—Lackland v. Garesche, 267.

2. *Trusts and trustees—Separate estate of married woman—Power of disposal and appointment—Failure to exercise—Rents and profits, etc.*—By the terms of a deed for the sole and separate use of a married woman, the trustee covenanted, * * * upon the death of her husband to convey and dispose of the property and all proceeds thereof in such manner and to such persons as she might by her will or other writing appoint, and in default of such appointment to convey the premises to the children when they should become of age *Held*, that the deed created a springing contingent trust in favor of the children, which might be defeated by a disposition of the property by her during her life, or by an appointment to take effect after her death. But where no appointment was made during her life, the trustee, and not her administrator, was the person then authorized to hold the title and collect the rents till the children became of age, and afterward to pay over to them their respective shares.—Straat, Adm'r v. Uhrig, et al., 482.

3. *Limitations, statute of—Trusts, express—Denial of trust.*—In express technical trusts, the statute of limitations does not begin to run until the trust is denied by the trustee; (Smith vs. Ricords, 52 Mo., 581, affirmed) but the *cestui que trust*, in case of such denial, is limited to the period allowed for the recovery of legal estates at law.—Ricords, Admx. v. Watkins, 553.

TRUSTS AND TRUSTEES, continued.

4. *Limitations, statute of—Implied trusts—Right of action.*—In implied trusts the statute of limitations begins to run as soon as the facts are brought to the knowledge of the *cestui que trust*, so that he can take steps to enforce the trust. (Smith v. Ricords, 52 Mo., 581, affirmed.)—Id.

5. *Limitations, statute of—Trusts, implied—Express.*—It is not impossible that an express continuing trust, against which the statute of limitations would not run, could be shown by evidence independent of the writing conveying the property to which the trust is attached; and that it thus might be shown by independent testimony, that the possession or conduct of the trustee was consistent with, and not adverse to, the claim or right set up by the *cestui que trust*.—PER VORIES AND NAPTON, J. J., DISSENTING.—Id.

See Bills and notes, 2, 9, 10; Mortgages and Deeds of Trust.

V.

VENDOR, see Land and Land Titles, 6.

VENUE, CHANGE OF.

1. *Quo warranto—Change of venue—Application for, to what court addressed, etc.*—Where in *quo warranto* the issues of fact are ordered by the Supreme Court to be tried in a specified county, application for a change of venue made to the court of that county is properly overruled. Any objections to the venue should in such case be addressed to the Supreme Court.

The general law touching change of venue has no application to such a case.—State v. Townsley, 107.

VERDICT, see Practice, civil, trial, 1; Practice, Supreme Court, 3, 8.

W

WAIVER, see Contracts, 1, 6.

WEBSTER GROVES SCHOOL DISTRICT, see Schools and School Lands, 1.

WILLS.

1. *Wills—Extra-territorial operations of—Responsibility of executor.*—So far as realty is concerned, a will has no extra-territorial force, and the executor cannot sue for, or in anywise intermeddle with, property of his testator, real or personal, in another State, unless the will be there proven, or the laws of such States, dispensing with the probate anew, confer the requisite jurisdiction; and hence, where no such provisions prevail, he cannot be held liable on his bond as executor, for his acts done in another State. Whether he might not be chargeable as trustee for misapplication of funds received in another State, not passed on by the court.—Cabanne, et al. v. Skinker, Ex'r of Forsyth, et al., 357.

2. *Wills—Contest touching—Right to open and close.*—In a statutory proceeding to contest a will (Wagn. Stat. 1368, § 29) the *onus probandi* is upon the defendant, and he is therefore entitled to open and close. But the right to open and close generally rests very much in the sound discretion of the court; and an error upon this point will not warrant a reversal, unless defendant is shown to have suffered injury in consequence.—Harvey, et al. v. Heirs of Sullens, 372.

3. *Wills—Capacity necessary to render testator competent.*—To render a testator competent to make his will, the law does not require any particular degree of understanding. He is simply required to be of sound mind to manage his own affairs, and to know intelligently what disposition he is making of them.—Id.

4. *Wills—Contest, touching—Administrator—Functions suspended—Appointment of administrator pendente lite—Construction of statute.*—Where proceedings are commenced in the Circuit Court under the statute (Wagn. Stat., 1368 § 29) to contest the validity of a will, the Probate Court is authorized by virtue of § 13, of the Administration Act, (Wagn. Stat., p. 72) to suspend the functions of the executor or administrator, and to appoint a temporary administrator, *pendente lite*. The latter section was enacted mainly, if not solely, in view of proceedings authorized by the statute touching wills.

WILLS, continued.

This authority to suspend and supersede during the contest applies not merely to the case of an executor named in the will, but is broad enough to reach that of an administrator with the will annexed, who derives his power solely from appointment by the Probate Court.–Lamb, Adm'r v. Helm, Adm'x, 420.

5. *Wills—Probate of—Contest touching proceedings in Circuit Court—Onus probandi.*—When a contest is commenced in the Circuit Court under our statute concerning wills, either to establish a will which has been rejected by the Probate Court, or to contest the validity of a will which has been allowed and probated in the Probate Court, in either case the party who relies on, or asserts the validity of the will must prove it up in the same manner, and to the same extent, as if no action had been taken by the Probate Court.—Id.

6. *Wills—Contest over—Appointment of administrator pending—Wf. has no priority under § 6 of Administration law—Const. statute.*—Section 6 of the administration law (Wagn. Stat., p. 72,) does not give preference to the wife over others to be selected under § 13 of same act, as special administrators pending contest over the will of the deceased husband. Section 6 refers to the appointment of general administrators, who are to administer and distribute the estate, and has no reference to special administrators appointed to preserve the estate under order of court.—Id.

WITNESSES, see Evidence.